THE WHITE HOUSE
WASHINGTON

WASH. POST: 3-12-87

March 16, 1987

NOTE TO MARI MASENG

THROUGH: LINAS KOJELIS LK

FROM: MATT ZACHARI MZ

SUBJECT: Sen. Nunn/ABM Treaty

Attached for your use are two recent Washington POST articles that summarize Sen. Sam Nunn's position on reinterpretation of the ABM treaty. Also attached is an exerpt from Sen. Nunn's remarks on the Senate floor and report he submitted; significant passages are highlighted. We have the complete report and remarks if you would like more information.

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Senate ratification hearings on the treaty which "flatly and unequivocably contradicted" administration assertions that the hearing record supported a more permissive or "broad" interpretation of the 1972 pact.

LEVEL 1 - 16 STORIES

1. Copyright © 1987 The New York Times Company; The New York Times, March 15, 1987, Sunday, Late City Final Edition, Section 4; Page 2, Column 1; Week in Review Desk, 338 words, THE WORLD; Getting Down to Specifics on Missile Monitors By Katherine Roberts, Milt Freudenheim and James F. Clarity, LEAD: For a serious negotiation on arms control, the talking has been unusually public. Soviet officials have been voluble in promoting Mikhail S. Gorbachev's latest proposals. And last week, the Reagan Administration outlined its ideas for monitoring compliance with a treaty on removing medium-range missiles from

2. The Associated Press, March 14, 1987, Saturday, AM cycle, Washington Dateline 856 words, ABM Battle Seen as Prelude to 'Star Wars' Fight, By TIM AHERN, Associated Press Writer, WASHINGTON, Treaty-Star Wars, LEAD: The fight over President Reagan's attempt to reinterpret the 1972 Anti-Ballistic Missile treaty is likely to have a major impact on how much money Congress approves for "Star Wars," according to lawmakers on both sides of the issue.

3. Copyright © 1987 The Washington Post, March 14, 1987, Saturday, Final Edition FIRST SECTION; PAGE A1, 743 words, Nunn: No Basis for Shift on ABM Treaty; Senator Warns of Possible Confrontation on 'Star Wars' Funding, Dusko Doder, Washington Post Staff Writer, LEAD: In his third speech on the Senate floor in three days, Sen. Sam Nunn (D-Ga.) yesterday concluded that there was no basis for the Reagan administration's attempt to reinterpret the 1972 Antiballistic Missile Treaty to allow testing and development of a "Star Wars" missile defense., NATIONAL NEWS, FOREIGN NEWS

4. Copyright © 1987 The New York Times Company; The New York Times, March 13, 1987, Friday, Late City Final Edition, Section A; Page 16, Column 2; National Desk, 757 words, WASHINGTON TALK; Perle Is Bowing Out, His Goals and Acerbity Intact, By MICHAEL R. GORDON, Special to the New York Times, WASHINGTON, March 12, LEAD: Richard N. Perle, a staunch opponent of past arms control agreements with the Soviet Union and one of this city's most accomplished bureaucratic infighters, will leave office this spring, having accomplished his two main policy objectives: He has helped keep the Reagan Administration from concluding new agreements he deemed unsound and he has helped keep it from observing the old ones he was against from the start.

5. Copyright © 1987 Reuters Ltd., March 13, 1987, Friday, AM cycle, Washington Dateline, 582 words, WHITE HOUSE STICKS TO BROAD TREATY READING; REVIEW CONTINUES, WASHINGTON, ARMS-TREATY, LEAD: The White House insisted today that its broad interpretation of the 1972 Anti-Ballistic Missile (ABM) treaty was the right one but said the treaty was still being studied.

6. Copyright © 1987 The Washington Post, March 13, 1987, Friday, Final Edition, FIRST SECTION; PAGE A25; THE FEDERAL PAGE, 792 words, Perle Resigns Top Arms Policy Post; Hard-Liner Says Stance Succeeded, Marjorie Williams, Washington Post Staff Writer, LEAD: Assistant Secretary of Defense Richard N. Perle, for six years a chief architect of Reagan administration strategic arms policies, yesterday announced his resignation, saying that recent events had vindicated the administration's tough stance toward arms control with the Soviet Union., NATIONAL NEWS

7. Copyright © 1987 The Washington Post, March 13, 1987, Friday, Final Edition, FIRST SECTION; PAGE A35, 718 words, Nunn Again Hits ABM Pact Shift; 4 Administrations Backed Strict Interpretation, Senator Says, Dusko Doder, Washington Post Staff Writer, LEAD: Senate Armed Services Committee Chairman

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Sam Nunn (D-Ga.) asserted yesterday that four U.S. administrations consistently supported a restrictive interpretation of the 1972 Antiballistic Missile (ABM) treaty until the Reagan administration's attempt in 1985 to advance a new, broad reinterpretation of the pact., NATIONAL NEWS, FOREIGN NEWS

8. Copyright © 1987 Reuters, Ltd.; Reuters North European Service, MARCH 12, 1987, THURSDAY, PM CYCLE, 262 words, LEADING U.S. SENATOR SAYS SPACE TESTING VIOLATES ABM TREATY, WASHINGTON, MARCH 11, ARMS-TREATY, LEAD: A U.S. SENATE ARMS EXPERT TODAY SAID PRESIDENT REAGAN HAS NO LEGAL CASE FOR PROCEEDING WITH A BROAD INTERPRETATION OF AN ARMS CONTROL TREATY ALLOWING SPACE-BASED TESTING OF "STAR WARS" DEFENCE SYSTEMS.

9. Copyright © 1987 The Financial Times Limited; Financial Times, March 12, 1987, Thursday, SECTION I; American News; Pg. 3, 308 words, Power To Reinterpret ABM Treaty Challenged, Stewart Fleming, US Editor, Washington

10. Copyright © 1987 The Times Mirror Company; Los Angeles Times, March 12, 1987, Thursday, Home Edition, Part 1; Page 1; Column 4; Foreign Desk, 837 words, NUNN ASSAILS ADMINISTRATION ON ABM POLICY, By PAUL HOUSTON and ROBERT C. TOTH, Times Staff Writers, WASHINGTON, LEAD: In a scathing report, Sen. Sam Nunn (D-Ga.) dealt a sharp blow Wednesday to the Reagan Administration's contention that testing and development of a space-based missile defense system is permitted under the Anti-Ballistic Missile Treaty with the Soviet Union.

11. Copyright © 1987 The New York Times Company; The New York Times, March 12, 1987, Thursday, Late City Final Edition, Section A; Page 1, Column 4; Foreign Desk, 885 words, NUNN SAYS RECORD ON THE ABM PACT IS BEING DISTORTED, By MICHAEL R. GORDON, Special to the New York Times, WASHINGTON, March 11, LEAD: Senator Sam Nunn, a key Democrat on military and arms-control issues, charged today that the Reagan Administration had misrepresented the 1972 Senate deliberations on the Antiballistic Missile Treaty so as to support its new broad interpretation of the treaty.

12. Proprietary to the United Press International 1987, March 12, 1987, Thursday, AM cycle, Washington News, 582 words, Nunn again blasts broad ABM interpretation, By ELIOT BRENNER, WASHINGTON, Abm, LEAD: Sen. Sam Nunn, D-Ga., rejected Thursday administration claims that superpower statements and behavior since the 1972 ABM treaty could allow an expansion of President Reagan's ''Star Wars'' program.

13. Proprietary to the United Press International 1987, March 12, 1987, Thursday, PM cycle, Washington News, 739 words, By ELIOT BRENNER, WASHINGTON, Abm, LEAD: President Reagan's push for a broad reading of the 1972 ABM Treaty to allow expansion of his ''Star Wars'' program is being rejected by chairmen of three key Senate panels, joined by a retired colleague who helped ratify the pact.

14. Copyright © 1987 The Washington Post, March 12, 1987, Thursday, Final Edition, FIRST SECTION; PAGE A1, 1176 words, Nunn Takes Strict View On ABM; Broad Reading of Pact To Allow SDI Work Is Termed 'Absurd', R. Jeffrey Smith, Washington Post Staff Writer, LEAD: Senate Armed Services Committee Chairman Sam Nunn (D-Ga.) said yesterday that a "traditional," or restrictive, interpretation of the 1972 Antiballistic Missile (ABM) treaty was "explicitly" supported by Pentagon and White House statements shortly after it was signed, and forcefully rebuked the Reagan administration for asserting otherwise., NATIONAL NEWS

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15. The Xinhua General Overseas News Service, MARCH 12, 1987, THURSDAY, 457 words, top u.s. congressmen oppose reinterpretation of abm treaty, washington, march 12; ITEM NO: 0312008, LEAD: the reagan administration's attempts to redefine the 1972 anti-ballistic missile (abm) treaty have headed strong oppositions at home though progress is being made with the soviet union on banning medium-range euromissiles. following a monday statement by six former defense secretaries urging president reagan to continue observance of the restrictive interpretation of the treaty, senate democratic leaders unanimously rejected wednesday the administration's view that a broader interpretation was "legally correct.

16. The Associated Press, March 6, 1987, Friday, AM cycle, Washington Dateline, 473 words, Byrd And Nunn Seek Pentagon Records, By TIM AHERN, Associated Press Writer, WASHINGTON, Arms Control-ABM, LEAD: Leading Senate Democrats asked for 15-year-old Pentagon records on Friday in a continuing dispute over whether President Reagan's "Star Wars" anti-missile plan would violate a 1972 U.S.-Soviet treaty.

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Nunn Takes Strict View On ABM

Broad Reading of Pact To Allow SDI Work Is Termed 'Absurd'

By R. Jeffrey Smith
Washington Post Staff Writer

Senate Armed Services Committee Chairman Sam Nunn (D-Ga.) said yesterday that a "traditional," or restrictive, interpretation of the 1972 Antiballistic Missile (ABM) treaty was "explicitly" supported by Pentagon and White House statements shortly after it was signed, and forcefully rebuked the Reagan administration for asserting otherwise.

Nunn, whose view of the ABM treaty has been awaited eagerly because of his influence on such issues, said on the Senate floor that he had found "a series of authoritative statements" in the record of Senate ratification hearings on the treaty which "flatly and unequivocably contradicted" administration assertions that the hearing record supported a more permissive or "broad" interpretation of the 1972 pact.

Nunn said the assertions, which were initially expressed by State Department legal adviser Abraham D. Sofaer, were "absurd," "illogical" and "inadequate." He also said that Sofaer had undermined the administration's credibility "by the distorted manner" in which he had addressed the issue.

Nunn's judgment on the proper interpretation of the ABM treaty was a blow to the Reagan administration, which has sought to justify its broad interpretation of the pact to make room for more aggressive testing and development of missile defense technologies under the Strategic Defense Initiative (SDI), or "Star Wars," program.

Nunn's view was echoed yesterday by Senate Foreign Relations Committee Chairman Claiborne Pell (D-R.I.) and Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.).

Senior White House officials yesterday indicated a new willingness to explore compromise with Congress on the question. One senior official said the new team of Howard H. Baker Jr. and Frank C. Carlucci in the White House is trying to work out "a constructive arrangement" to avoid a confrontation with

Congress over the ABM treaty and SDI research and development.

Specifically, members of the president's national security planning group yesterday discussed possible compromises with Congress that could head off legislation demanding that the administration follow the traditional, or "narrow," interpretation.

Although the president decided in 1985 on the basis of Sofaer's analysis that the "broad" interpretation was legally justified, he also agreed in response to protests from Congress and U.S. allies not to follow the interpretation right away.

The issue has arisen again because Secretary of Defense Caspar W. Weinberger urged the president last month to change his mind and embrace the broad interpretation. The Soviets and many U.S. critics of administration policy, including officials who helped negotiate the ABM treaty under President Richard M. Nixon, have said the pact prohibits the kinds of testing Weinberger has sought to begin.

After a brief administration debate, President Reagan agreed last month to postpone a decision to act on the broad interpretation until he had consulted with congressional leaders and allied officials, many of whom oppose the interpretation because they think it would gut the ABM treaty.

In an unusual letter to Nunn released yesterday, Sofaer seemed to acknowledge that his original finding that the ratification process supported the broad interpretation may have been flawed. Sofaer wrote that "the points made on the ratification record of the treaty . . . in our October 1985 analysis did not provide a complete portrayal of the ratification proceedings."

In the letter, which was sent to Nunn three days ago, Sofaer also said he had "concentrated" on the separate issue of what U.S. and Soviet officials said during the treaty negotiations, not on the Senate ratification, and that "I did not review this material personally."

In 1985 Sofaer testified to the Senate Armed Services Committee that the ratification record "can fairly be read to support the so-called broader interpretation" of the treaty.

Sofaer said in his letter that a more "comprehensive" study of the issue is under way, and he promised to "personally review this material and satisfy myself that the analysis we present is complete."

Nunn cited several statements by executive branch officials during the ratification hearings that he said Sofaer had ignored or "distorted" in 1985. One was a written statement by Melvin R. Laird, then the secretary of defense, that Nunn said "clearly sets forth the traditional interpretation of the treaty;" another was a written statement by John S. Foster Jr., then the Pentagon's senior technical official, that Nunn said "directly contradicts" Sofaer's claims about the hearings.

Nunn also said Sofaer had omitted a "crucial" comment by a member of the Joint Chiefs of Staff "that the JCS were aware of the limits on development and testing of [exotic missile defense technologies], . . . had agreed to them, and recognized that this was 'a fundamental part of the agreement.' "

Nunn said the record demonstrated that Sofaer's analysis of comments at the time by Sen. Henry M. Jackson (D-Wash.), a key figure in the ratification who interrogated Laird, Foster, and the JCS official, "is a complete and total misrepresentation."

Nunn also noted that Sofaer "has not identified, nor did I find, any statements in the record in which any senator or any Nixon administration official explicitly stated" that realistic testing of an exotic missile defense was allowed. As a result, Nunn said, "Many in the Senate would be inclined to apply the classic line of cross-examination to the executive branch: 'Should we believe what you were telling us then or should we believe what you are telling us now?' "

Nunn cautioned that his remarks applied only to the ratification hearings, and not to the actual treaty negotiations or the record of subsequent statements and activities on missile defense efforts by the two superpowers. Nunn said he will address these issues, which some administration officials consider more important in the debate, in speeches today and tomorrow.

But Nunn added that assertions by the administration that the ratification process did not matter are "contrary to the long-term interests of the United States," and raise a "direct constitutional confrontation with Congress" that may lead to restrictions on funding for SDI.

Several administration officials said they would like to strike a bargain with Congress in which SDI funds might still be increased. But the officials said Reagan and Weinberger were unenthusiastic about making key political concessions.

Sen. Albert Gore Jr. (D-Tenn.), for example, has proposed to extract an administration pledge to abide by the narrow interpretation for at least another year, as well as a commitment to bargain seriously on SDI with the Soviets, in exchange for "respectable" funding of SDI.

But Gore also faces significant congressional opposition to his plan, staff aides and legislators said yesterday, especially in light of Nunn's vigorous criticism of the administration's position.

Staff writer Lou Cannon contributed to this report.

WASH. POST: 3-13-87

Nunn Again Hits ABM Pact Shift

4 Administrations Backed Strict Interpretation, Senator Says

By Dusko Doder
Washington Post Staff Writer

Senate Armed Services Committee Chairman Sam Nunn (D-Ga.) asserted yesterday that four U.S. administrations consistently supported a restrictive interpretation of the 1972 Antiballistic Missile (ABM) treaty until the Reagan administration's attempt in 1985 to advance a new, broad reinterpretation of the pact.

The Georgia Democrat, a key arms-control and military affairs figure on Capitol Hill, for the second time in two days rebuked the administration for attempting to provide a new legal basis for aggressive testing and development of the components of the Strategic Defense Initiative (SDI), or "Star Wars," missile defense.

On Wednesday, Nunn asserted that his research had led him to the conclusion, "compelling beyond a reasonable doubt," that the Senate's ratification of the treaty in 1972 was based on a restrictive interpretation of the pact. He charged that Abraham D. Sofaer, the principal author of the reinterpretation and State Department legal adviser, had advanced a "complete and total misrepresentation" of parts of the ratification record to bolster his case.

Yesterday, Nunn rebutted in great detail another administration argument offered by Sofaer and Defense Secretary Caspar W. Weinberger. This argument holds that the United States has not held to a single, consistent position on what the 1972 treaty permits in regard to exotic defenses based in space.

Nunn said that "the available record of both official and unofficial U.S. statements directly contradicts" both Weinberger and Sofaer.

He cited several administration documents including a 1979 Arms Control Impact Statement dealing specifically with the issue of testing and development of space-based antiballistic missile technologies under the ABM treaty.

The statement said that "the development, testing and deployment of such systems . . . is prohibited by Article V of the treaty."

Subsequent statements to Congress by the Reagan administration "consistently took the position that mobile space-based ABMs using exotics could not be tested and developed under the ABM treaty," Nunn said.

Nunn concluded that by its actions and words since 1972, the Soviet Union also appeared to accept the initial interpretation of the treaty.

Nunn added that the Reagan administration had reaffirmed that traditional, or restrictive, interpretation of the treaty as recently as March 1985. Sofaer's reinterpretation in October 1985, Nunn said, represented an "amazing sort of legalistic gymnastics."

Nunn accused Sofaer of presenting a doctored version of the record to support this argument in 1985, dropping what Nunn called "the crucial first sentence" of one paragraph he had quoted to support the argument that the administration in 1982 had adopted a broad interpretation of the ABM treaty in an official document.

Nunn charged further that in relying on one informal publication of the Arms Control and Disarmament Agency, Sofaer ignored much more important documents based on high-level policy reviews which explicitly embraced the restrictive interpretation of the treaty.

Sofaer yesterday called on another critic, Sen. Carl Levin (D-Mich.), to apparently retract some of his earlier testimony on the issue.

"In my office today," Levin said on the Senate floor, "Judge Sofaer explicitly and repeatedly disavowed the October 1985 memorandum regarding the ratification record of the ABM treaty [which claimed that record supported Sofaer's new, broad interpretation of the treaty]. He described it as an incomplete review of the ratification record which was prepared by young lawyers on his staff. He said he did not stand behind that memorandum or those parts of his testimony before the House and Senate committees based on that memorandum." The testimony Sofaer gave that October was sharply criticized by Nunn yesterday.

Levin said that Sofaer told him he was preparing a new review of the record but that "he has not changed his mind about the validity" of his reintepretation of the pact.

A spokesman for Sofaer refused to comment.

Nunn is scheduled today to address the question of the ABM negotiating record, which along with the Senate's original understanding of the meaning of the treaty and subsequent practices and public statements, has a crucial bearing on the treaty interpretation.

WASH POST - 3-13-87

Perle Resigns Top Arms Policy Post

Hard-Liner Says Stance Succeeded

LOP

By Marjorie Williams
Washington Post Staff Writer

Assistant Secretary of Defense Richard N. Perle, for six years a chief architect of Reagan administration strategic arms policies, yesterday announced his resignation, saying that recent events had vindicated the administration's tough stance toward arms control with the Soviet Union.

In an interview, Perle predicted that President Reagan will meet Soviet leader Mikhail Gorbachev this year in a full summit, and said he anticipates that the two leaders will agree on eliminating intermediate-range nuclear forces in Europe.

Perle, who became assistant secretary for international security policy in March 1981, yesterday released a letter to Reagan in which he announced his resignation "effective this spring after an orderly transition in my office." He will continue to serve as an adviser to the Defense Department and to "other executive departments," he said, without explaining what that role might entail, and said he plans to write the novel he attempted to sell to publishers last April.

Bidding on his five-page prospectus passed $300,000 before Perle withdrew it from submission following charges that he would unfairly profit from public office and might compromise national security.

At a news conference, Perle dismissed as "profoundly wrong" a Wednesday statement by Sam Nunn (D-Ga.), chairman of the Senate Armed Services Committee, challenging the administration's "broad" interpretation of the 1972 Antiballistic Missile (ABM) treaty. That interpretation, of which Perle has been a leading proponent, would allow the United States to test components of the Strategic Defense Initiative (SDI), or "Star Wars." Nunn charged that the administration had distorted the intent of the treaty negotiators and misrepresented the record of the treaty's ratification by the Senate.

While Perle said yesterday that "It's not for me to announce" who will succeed him in the job, knowledgeable sources said that the nomination is expected to go to Frank J. Gaffney Jr., deputy assistant secretary of defense for nuclear forces and arms control policy, a Perle protege.

Gaffney, 33, served with Perle on the staff of the late Sen. Henry M. Jackson (D-Wash.). Gaffney is a hard-liner whom Perle has groomed as a successor by assigning him to the most sensitive deputy slot, sources said. While "the process isn't complete," according to one source, Gaffney confirmed that he has been under consideration. He added, however, that "as you know, that is a decision that is made in the White House. To the best of my knowledge, no decision has been made at this time."

Perle, often described as "the Prince of Darkness" for his dour outlook on Soviet intentions and his hard-line stance on arms control negotiations, said yesterday "it is not true, and it has never been true," that he has stood in the way of arms control agreements.

> ***"... Those who appear most passionate for arms control are often the least competent to go out and negotiate it."***
>
> — Richard N. Perle

In his letter to Reagan, he wrote, "While much difficult negotiation lies ahead, I believe that you will succeed where your detractors have failed, and that you will finally prove that those who appear most passionate for arms control are often the least competent to go out and negotiate it."

Such remarks have earned Perle a reputation as an articulate but sometimes adder-tongued advocate of administration policy. Most recently, he stirred controversy at an international conference Feb. 1 by condemning Western European leaders as "mealy-mouthed" in their opinions on world security issues, given to "misty blandishment" toward the Soviet leadership. The White House distanced itself from Perle's remarks, taking the unusual step of denying that he spoke for the administration.

Perle said that his book will be "a real novel. The impression that it will be a thinly veiled memoir is quite mistaken." However, the proposal circulated among publishers last spring said the book would concern "an array of bureaucratic maneuvers recounted in the context of actual events altered only enough to make them publishable, to preserve the fiction in 'Memoranda [the book's tentative title].'" Perle's literary agent, Robert B. Barnett of the law firm Williams & Connolly, said that he would probably circulate the same proposal he offered to publishers last spring.

When Perle sought offers for his proposed novel last spring, Nunn wrote to President Reagan charging that Perle was "violating a fundamental public trust and endangering the confidentiality of important national security interests." Perle subsequently announced that he would not contract with a publisher until leaving office.

Asked to describe his advisory arrangement with the Defense Department, Perle said that "I haven't worked out all of the details yet," and that he will "be at the disposal of the secretary of defense."

The bill clerk proceeded to call the roll.

Mr. NUNN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER OF PROCEDURE

The PRESIDING OFFICER. Under the previous order, Senators may now speak out of order for up to 30 minutes each, not to extend beyond the hour of 11 a.m.

INTERPRETATION OF THE ABM TREATY

PART III: THE ABM NEGOTIATING RECORD

Mr. NUNN. Mr. President, in my remarks today, I will present the third segment of my report on the ABM Treaty reinterpretation controversy.

On Wednesday, I addressed the original meaning of the treaty as presented to the Senate in 1972. Yesterday, I discussed the statements and practices of the parties from the time the treaty was signed in 1972 until the reinterpretation was announced in late 1985.

Today I will address the record of the ABM Treaty negotiations in 1971 and 1972 as provided to the Senate by the Department of State.

Mr. President, I again apologize to the Chair and my colleagues for my raspy voice this morning, but I am still battling laryngitis, though it is getting a little better.

In my remarks on Wednesday, I concluded that the Nixon administration explicitly told the Senate during the treaty ratification proceedings that the treaty prohibits the development and testing of mobile/space-based ABM's using exotics. I also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the treaty, and that the evidence of this is compelling beyond a reasonable doubt.

Yesterday, I reviewed the available record of the United States and Soviet practices and statements during the 13-year period between the signing of the treaty and the announcement of the reinterpretation which occurred in October of 1985.

Under both international and domestic law, such evidence may be considered in determining the meaning of the treaty.

Based on the information provided to the Senate to date by the State Department, I found no evidence which contradicted the Senate's original understanding of the meaning of the treaty. On the contrary, I noted that successive administrations, including the Reagan administration, had prior to 1985 consistently indicated that the treaty banned the development and testing of mobile/space-based ABM's using exotics.

Summarizing then, where the situation now stands after the first two reports: First, the Reagan administration made a case for a broader reading of the treaty based, in part, on an analysis of the Senate ratification proceedings, arguing that the record of this debate supported the reinterpretation. I found this case not to be credible. Second, the Reagan administration made a case for a broader reading of the treaty based, in part, on subsequent practice, arguing that the record of the United States and Soviet statements and practices supported the reinterpretation. I also found this case not to be persuasive.

Some advocates of the broader reading—including its principal author, Judge Sofaer—now appear to be hanging their hats on the negotiating record, arguing that this negotiating record provides persuasive or compelling support for their case. As I noted on Wednesday, the administration's focus on the negotiating record as a primary source of treaty interpretation confronts us with three separate possibilities:

The first possibility: If the negotiating record is consistent with the original meaning of the treaty as provided to the Senate by the executive branch, the traditional interpretation would prevail beyond question.

The second possibility: If the negotiating record is ambiguous or inconclusive, there would be no basis for abandoning the traditional interpretation. Absent compelling evidence that the contract consented to by the U.S. Senate was not the same contract entered into between the Nixon administration and the Soviet Union—and we do not have that kind of evidence—the treaty presented to the Senate at the time of ratification should be upheld.

There is a third possibility: If the negotiating record clearly establishes a conclusive basis for the reinterpretation, this would mean that the President at that time signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications and as far as I know would be a case of first impression.

Because of the grave constitutional issues at stake, and my responsibilities as chairman of the Armed Services Committee and cochairman of the Arms Control Observer Group, I have taken a personal interest in this matter and have spent countless hours in S-407 reviewing the negotiating record, which is still classified.

It is important to note that the material presented in terms of the negotiating record consists of a disjointed collection of cables and memoranda.

This is not unusual. A lot of people really do not understand what a negotiating record is. It is not a clear transcript of a dialog between the two superpowers as they negotiate around the table—far from that. That is not what a negotiating record is. There is no single document or even set of documents that constitutes an official negotiating history. There is no transcript of the proceedings. Instead, what we have is a varity of documents of uneven quality—some of them precise, some of them well structured, some of them done hastily, some of them simply notes in the margin. Some involve detailed recollections of conversations, others contain nothing more than cryptic comments.

Nonetheless, this is the record on which the Reagan administration's decision was based. If the State Department identifies and submits other relevant documents, I shall be prepared to review them as well. I want to stress to my colleagues that what I have examined is a negotiating record presented by the State Department to the U.S. Senate. If there are other matters which I have not seen, then, of course, my remarks cannot possibly cover those matters. We have been assured that we have been given the negotiating record as known to the State Department.

Having been through the material, I will understand why, as a matter of international law, the negotiating record is the least persuasive evidence of a treaty's meaning. It does not have the same standing, of course, as the treaty itself under international law; it does not have the same standing as the conduct of the parties subsequent to entering into the agreement; it does not have the same standing as the ratification proceedings whereby the Senate takes formal testimony and has formal debate and has formal presentation of matter by administration witnesses. To put this in the right international legal framework Lord McNair, who is an expert on treaties and interpretations thereof, states as follows:

> The preceding review of the practice indicates that no litigant before an international tribunal can afford to ignore the preparatory work of a treaty, but that he would probably err in making it the main plank of his argument. Subject to the limitations indicated in this chapter, it is a useful makeweight but in our submission it would be unfortunate if preparatory work ever became a main basis of interpretation. In particular, it should only be admitted when it affords evidence of the common intention of both or all parties.

This same general view is set forth in the commentary on the second restatement of the foreign relations law of the United States, which notes that "conference records kept by delegations for their own use * * * will usually be excluded" from consideration under international law, although they may be considered by national courts for domestic purposes.

The materials in the negotiating record provided the Senate simply do not compare in quality to the debates and reports normally relied upoon for interpretation of legislation. Nonetheless, the records provided to the Senate contain a significant amount of material bearing on the issue of the development and testing of exotics.

Based on my review, I believe that Judge Sofaer has identified some ambiguities in this record. One cannot help but wish that the United States and Soviet negotiators had achieved a higher level of clarity and precision in their drafting of this accord. Of course, as we in the Senate well know, writing clear law is a worthy goal but one which is not easily attained. These ambiguities are not, however, of sufficient magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate.

I want to repeat that sentence, because I think it is important: These ambiguities are not, however, of such magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate.

Notwithstanding the ambiguities, the negotiating record contains substantial and credible information which indicates that the Soviet Union did agree that the development and testing of mobile/space-based exotics was banned. I have concluded that the preponderance of evidence in the negotiating record supports the Senate's original understanding of the treaty—that is, the traditional interpretation.

I have drafted a detailed classified analysis which examines Sofaer's arguments about the negotiating record at great length. Over the next few days, I intend to consult with the distinguished majority leader, Senator BYRD, about submitting this report for the review of Senators in room S-407. I will also work with the State Department to see how much of this analysis can be declassified and released for public review.

I would, of course, like for all of it to be released.

Mr. President, I believe it is appropriate at this juncture to pause for a moment and reflect on how the administration could be in such serious error on its position on this very important issue. First, the administration, in my view, is wrong in its analysis of the Senate ratification debate. I think I have set that forth in great detail.

Second, I think the Reagan administration is wrong in its analysis of the record of subsequent practice, at least insofar as we have been given information on that subject.

Third, I believe the administration is wrong in its analysis of the negotiating record itself. I believe that we need to take a look at the procedure by which the administration arrived at its position. I think the procedure itself, as people find out more about it, will reveal itself as having been fundamentally flawed.

At the time the decision was announced by the Reagan administration in 1985, the administration was divided as to the correct reading of the negotiating record, with lawyers at the Arms Control and Disarmament Agency, the Defense Department, and even within Judge Sofaer's own office holding conflicting views. By his own admission, Judge Sofaer had not conducted a rigorous study of the Senate ratification proceedings or the record of United States and Soviet practice, even though these are critical—indeed crucial—elements of the overall process by which one interprets treaties. Judge Sofaer made no effort to interview any principal ABM negotiator except Ambassador Nitze—even though most of these gentlemen were still active professionally and living in or near Washington, DC. Finally, there was no discussion with the Senate, despite the Senate's constitutional responsibilities as a conguarantor of treaties.

Mr. President, to say that this is a woefully inadequate foundation for a major policy and legal change is a vast understatement. I hope that we can now begin to address the real problems, begin to address the real problems that confront our Nation in the areas of strategic balance and arms control.

There are a number of specific steps which I believe our Government should take in trying to bring a final resolution to this legal controversy, which I think is an unfortunate controversy. First, I believe the State Department should declassify the ABM Treaty negotiating record after consulting with and informing the Soviet Union of our intentions. The only downside I can see to declassification, since this record is at least 15 years old, is the diplomatic precedent, and that is to be considered. However, if the Soviet Union is informed and consulted in advance of declassification, it seems to me that there would be no adverse precedent.

Second, we must recognize that by upholding the traditional interpretation of the treaty we certainly will not eliminate all the ambiguities with respect to the effect of the treaty. Some ambiguities remain. The United States and the Soviet Union have not reached a meeting of the minds on the precise meaning of such important words as "development," "component," "testing in an ABM mode," and "other physical principles." The appropriate forum for attempting to remove these ambiguities is the Standing Consultive Commission [SCC], as specified in the treaty. I strongly recommened that the SCC be tasked with the very important job of discussing these terms with the Soviet representatives and trying to come to mutual agreement.

Third and most important, we should continue to negotiate toward agreement in Geneva on a new accord limiting offensive as well as defensive systems, which would supersede the ABM Treaty as well as SALT II, and that would, of course, render moot this whole debate about narrow versus broad interpretation. Nothing would be better than to render this argument moot by entering into a comprehensive agreement on offense and defense and to have the terms defined with precision, clear up these ambiguities, and move on into the new arms control era.

Finally, we must develop an objective analysis of what tests are necessary under the strategic defense initiative which cannot be conducted under the traditional interpretation. We were told last year by General Abramson, the head of this project, that there were no tests which would be adversely impacted by the traditional interpretation before the early 1990's. If that has changed, we need to know what changes have taken place and what has driven those changes. I want to emphasize that our Armed Services Committee needs this analysis and we need it before we begin the markup of our committee bill, because any discussion of what this SDI money is going to be used for has to have as a foundation the overall interpretation and the tests that will be conducted thereunder.

I emphasize also that the determination should be based on a sound technological assessment and not on an ideologically driven kind of judgment. It is important for us to know that we are getting an analysis of scientists and not ideologs who have some agenda that has nothing to do with the technology and the tests at hand.

Mr. President, I hope to speak on this subject again in the future. I would like to be able to make my analysis of the negotiating record available to the public, but it is classified so I can only state the conclusions which I have given this morning. I will, however, be filing in the next several days a comprehensive analysis that will be classified. At some juncture in the future, as I have explained, I hope that that will be available for public dissemination.

I also repeat that I hope that we will be able to declassify this whole record. There will be many lawyers who would be interested in the analysis that has taken place. I hope our country could move out of the legalistic debate now and get down to the crucial substance of the SDI Program and the arms control issues with which we are faced.

Mr. President, I should like to read for the RECORD what I think is a very important statement by six former Secretaries of Defense of our country on the ABM Treaty. The statement, dated March 9, 1987, is signed by the Honorable Harold Brown, the Honorable Melvin Laird, the Honorable Elliot Richardson, the Honorable Clark Clifford, the Honorable Robert McNamara, and the Honorable James Schlesinger—as I count it, three Republicans and three Democrats who served under different administrations.

STATEMENT BY FORMER SECRETARIES OF DEFENSE ON THE ABM TREATY

MARCH 9, 1987.

We reaffirm our view that the ABM Treaty makes an important contribution to American security and to reducing the risk of nuclear war. By prohibiting nationwide deployment of strategic defenses, the Treaty plays an important role in guaranteeing the effectiveness of our strategic deterrent and makes possible the negotiation of substantial reductions in strategic offensive forces. The prospect of such reductions makes it more important than ever that the U.S. and Soviet governments both avoid actions that erode the ABM Treaty and bring to an end any prior departures from the terms of the Treaty, such as the Krasnoyarsk radar. To this end, we believe that the United States and the Soviet Union should continue to adhere to the traditional interpretation of Article V of the Treaty as it was presented to the Senate for advice and consent and as it has been observed by both sides since the Treaty was signed in 1972.

HAROLD BROWN.
MELVIN R. LAIRD.
ELLIOT L. RICHARDSON.
CLARK M. CLIFFORD.
ROBERT S. MCNAMARA.
JAMES R. SCHLESINGER.

I thank the Chair, and again I thank the majority leader for giving me the opportunity to make this series of presentations before the Senate.

Mr. President, there are three members of my staff to whom I express my appreciation for the countless hours they have worked on the issues which I have presented during the last 3 days: Mr. Bob Bell of my staff, who is an expert on arms control, formerly worked for the Library of Congress and the Foreign Relations Committee of this body. He has spent several hundred hours in S. 407 reviewing the tedious details of the negotiating record. He is one of six Senate staff members who have had access to those records.

I also express my thanks to Mr. Andy Effron, who is an attorney who formerly served with the Office of General Counsel in the Department of Defense and is now on the Senate Armed Services Committee staff. Although he has not had access to the negotiating record, he has been of tremendous assistance in the analysis of legal and international law matters relating thereto.

Also, I want to thank Mr. Jeff Smith, who is an attorney who was formerly in the legal adviser's office in the State Department and has been a staff member of the Armed Services Committee for the last couple of years. Mr. Smith has many other duties, including advising me on intelligence matters, but he has given us a lot of his time in helping analyze the ABM reinterpretation issue from an international law perspective. So I thank all of these dedicated staff members for very, very long hours on a very tedious but important subject.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS UNTIL 11 A.M. TODAY

Mr. BYRD. Mr. President, the swearing in of the new Senator from Nebraska will take place at 11 o'clock this morning. No Senator seeking recognition, I therefore ask unanimous consent that the Senate stand in recess until 11 a.m. today.

There being no objection, at 10:30 a.m. the Senate recessed until 11 a.m.; whereupon, the Senate reassembled when called to order by the Vice President.

SENATOR FROM NEBRASKA

The VICE PRESIDENT. The Chair lays before the Senate the Certificate of Appointment of the Honorable David Kemp Karnes as a Senator from the State of Nebraska.

Without objection, it will be placed on file, and the certificate of appointment will be deemed to have been read.

The certificate of appointment is as follows:

TO THE PRESIDENT OF THE SENATE OF THE UNITED STATES

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nebraska, I, Kay A. Orr, Governor of said State, do hereby appoint David Kemp Karnes a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of Edward Zorinsky is filled by election as provided by law.

Witness Her Excellency our Governor Kay A. Orr and our Seal hereto affixed at Lincoln this 11th day of March 1987.

KAY A. ORR,
Governor.

The VICE PRESIDENT. If the Senator-designate will present himself at the desk, the Chair will administer the oath of office as required by the Constitution and prescribed by law.

Mr. Karnes of Nebraska, escorted by Mr. EXON, advanced to the desk of the Vice President; the oath prescribed by law was administered to him by the Vice President; and he subscribed to the oath in the official oath book.

(Applause, Senators rising.)

Mr. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. LAUTENBERG). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONGRATULATIONS FOR SENATOR KARNES

Mr. BYRD. Mr. President, I join with my colleagues in congratulating our new Senator from Nebraska. Mr. KARNES is the 1,782d Senator to have served since the Senate first established a quorum on April 6, 1789.

It is a great honor for him to be a U.S. Senator, and I know I speak for all Senators in saying that we look forward to our service with him in this great institution.

I congratulate him.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. EXON. Mr. President, I am pleased this morning to have the opportunity to take part in the swearing-in ceremony for a very outstanding Nebraskan who is the brand new U.S. Senator.

I just heard over there some of the younger Members of the Senate who indicated that, I believe, DAVID KARNES is by 8 days the youngest Member of the U.S. Senate.

That allows some of our more younger Members to finally move up in seniority in the U.S. Senate. So, for that, they thank you.

I am looking forward to working with my colleague in representing our great State. We have lots of problems, and we will be working on them.

I also want the Senate to know that I went as far as I could possibly go this morning in true bipartisan spirit. Without even checking with the majority leader, I said we would be pleased to seat him on this side of the aisle. He respectfully declined, which indicates, I think, that he already has learned a great deal about the U.S. Senate. I am looking forward to working with him.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The minority leader.

Mr. DOLE. Mr. President, let me echo what was said by the distinguished majority leader and the distinguished Senator from Nebraska, Senator EXON.

Let me also congratulate the Governor of Nebraska, Gov. Kay Orr. We are honored to have her in our presence this morning. She has made an outstanding choice. We also welcome our colleagues from the House side, Congressman BEREUTER and Congresswoman SMITH.

I have told our distinguished and most junior colleague of the body that as No. 100, you do not have any extra duties, but you have no privileges, either.

We will be working together. It will be exciting in the next few days. I think, as we have indicated privately, you do have some big shoes to fill. Ed Zorinsky was a man respected by all of us. He was our friend. We certainly will miss him.

"DEFINITION

"SEC. 426. For purposes of this part, the term 'State' means any State of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.".

EFFECTIVE DATE

SEC. 3. This Act and the amendments made by this Act shall become effective on the date of enactment and shall be effective until the end of fiscal year 1989, at which time this Act and the amendments made by this Act shall be repealed.

RECOGNITION OF SENATOR WILSON

The PRESIDING OFFICER. The Chair recognizes the Senator from California.

Mr. WILSON. I thank the Chair.

SENATOR EDWARD ZORINSKY

Mr. WILSON. Mr. President, I rise, as have so many on this floor in this past week, to say a few words as best I can to try to express my own personal feelings of loss at the departure of our dear friend, Senator Ed Zorinsky.

I was privileged to know Ed Zorinsky I think longer than most on this floor because he and I spent some years together as brother mayors, he as mayor of Omaha, I as mayor of San Diego. In those first years of our acquaintance, I quickly came to have an enormous respect and fondness for him. He was, as everyone privileged to know him came to learn, a man whose sometimes serious demeanor belied a mischievous sense of humor and one that allowed him, while always taking his job very seriously, to never take himself seriously.

Indeed, his last moments on this Earth were spent in entertaining the audience at the Omaha Press Club at their annual gridiron dinner with what I am told was a hilarious skit. In fact, I was privileged to see an early rehearsal of it, a rendition which Ed gave to those of us who were attending a benefit for the Hospice of the Valley in Phoenix, AZ, earlier this year.

The lyric—and I am not sure whether he had written this, but it sounds like his work—was one that was set to a popular tune which said, "I am the great pretender." It described the fact that he had switched parties and that he entertained the notion of switching back. I can only say that anywhere Ed Zorinsky was there was a potential party. Anytime anyone was privileged to spend a few relaxed moments with him they invariably were treated not only to his good humor but to his sense of humor and a sort of sparkle that animated what at other times could be a very sober man, when the feelings of warmth and kindness that so clearly stirred him so often took form in some specific action or some speech. He was, a reporter once told me, a rather quiet man to be a Senator, less loquacious than many of his brethren.

That may be true, but it is also true that when he spoke people listened; that when he spoke, he did so with energy and the passion of honest conviction, which made him not only a zealous but an extraordinary advocate for his State and for any cause in which he believed.

I was privileged to serve with him on the Agriculture Committee, and he remarked to me soon after my arrival in this Chamber that it was interesting and he thought ironic he and I as former large city mayors should find ourselves once again involved in public service but this time in an entirely different arena where our concerns had to do with not urban problems but trying to enhance farm exports, trying to make it possible for the American farmer to be productive and maintain a decent farm income.

Last Sunday, those of us who were able to do so flew out to Omaha in order to attend the funeral services for Senator Zorinsky, to be with his family, to console them insofar as it was possible for friends to do that. Senator HATCH made an eloquent and moving tribute in the eulogy which he gave at the services for Senator Zorinsky. Unhappily, I am told there is no record of the eulogy beyond that of memory. He did commit to paper a poem he had been inspired to write flying out to the services. If he has not yet done so, I will ask that Senator HATCH place that poem in the RECORD.

But I suppose all of us might find, however cogent we think we sometimes can be in argument, there are moments when the English language, with all of its infinite richness, seems a poor and inadequate vehicle to express the kind of feeling which comes when one is so rarely privileged to meet a man like Ed Zorinsky and to enjoy his friendship.

Even in this extraordinary body, in which I have felt privileged to enjoy the friendship of extraordinary men and women, Ed Zorinsky was outstanding in the literal sense of the word. His appeal was bipartisan, not only to his constituency but to the friends he had on this floor. It was an appeal that was based upon our perception of the quality of the man, the extraordinary human quality, not just the intelligence and not just the sparkle and wit and the ability to poke fun at himself that endeared him to all of us but the great warmth and kindness which he exhibited in so many ways, never seeking recognition or thanks for it but taking the reward of satisfaction that came to him from helping others, whether it was sending some good, aged Nebraska beef to a friend who had enjoyed his cooking of it at a barbeque or helping a colleague with a problem in drafting or in gaining support for a cause in which Ed Zorinsky shared the colleague's own belief.

To say that we will miss him so understates the feeling that this is one of the moments to which I referred a moment ago, when even the English language does not permit either me or, I think, anyone else on this floor to say how much we valued him in life, how much we will treasure his memory, how greatly we hope that the sadness of his passing and the pain it has caused will ebb in time for his family and his friends. It is certain that as time goes on and that pain recedes, the happy fact is that the memory of Ed Zorinsky for those who knew him will persist as brightly, as clearly, and as vividly as did his friendship for us in life.

Mr. President, I will take no more time, because I am afraid that neither time nor words could ever express what I feel and what I think many of us would like to say to those whom Ed leaves behind—his loving and wonderful wife, Cece, and his three marvelous children. I hope that they are consoled by some sense of appreciation of the great value her husband and their father has been to all of us.

The PRESIDING OFFICER. The Chair, in his capacity as a Senator from Colorado, suggests the absence of a quorum.

The clerk will call the roll.

The assistant legislatve clerk proceeded to call the roll.

Mr BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SHELBY). Without objection, it is so ordered.

RECESS UNTIL 1:14 P.M.

Mr. BYRD. Mr. President, I have conferred with Mr. DOLE.

I ask unanimous consent that the Senate stand in recess for 40 minutes.

There being no objection, the Senate, at 12:34 p.m., recessed until 1:14 p.m., whereupon the Senate reassembled when called to order by the Presiding Officer [Mr. GORE].

ORDER OF PROCEDURE

The PRESIDING OFFICER. Under the previous order, Senators may now speak out of order for up to 30 minutes each for 2 hours.

The Senator from Georgia is recognized.

INTERPRETATION OF THE ABM TREATY

PART TWO: SUBSEQUENT PRACTICE UNDER THE ABM TREATY

Mr. NUNN. Mr. President, in a lengthy speech which I delivered on the Senate floor yesterday, I presented the first of three reports which I have prepared on the subject of the interpretation of the ABM Treaty. In those remarks, I addressed the crucial issues of the Senate's original understanding of the meaning of the treaty and the implications of that understanding for current executive branch conduct.

In my speech yesterday, I stated that I have concluded that the Nixon

administration presented the Senate with the so-called "Traditional Interpretation" of the treaty's limits on the development or testing of mobile/space-based exotics—that is, that such activities were banned. I stated that I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the treaty. In my judgment, this conclusion is compelling beyond a reasonable doubt.

In my remarks yesterday, I also took sharp exception to the administration's recent claim that statements made by the executive branch to the Senate at the time of treaty ratification proceedings have "absolutely no standing" with other states party to such treaties. In my opinion, this claim is incorrect in the specific case of the ABM Treaty and is squarely in conflict with the constitutional role of the Senate.

Mr. President, today I would like to present a second report to the Senate on the ABM reinterpretation issue.

The report that I am delivering today addresses the available record of United States and Soviet practices since 1972. I stress the words, "available record," because we do not have the entire record. No one should be under a misimpression here. The record we have now is comprised of a 1985 analysis that was submitted by the Department of State to the U.S. Senate and several other documents.

This report addresses the available record of United States and Soviet practices—including their public statement—since the treaty was signed in May 1972. As I noted yesterday, both international law and U.S. domestic law recognize that the practices of the parties, including their statements, provide evidence of their intent with regard to the meaning of a treaty.

The record of United States and Soviet subsequent practice now available to the Senate is far from comprehensive. For example, the Senate has no access to statements made by American and Soviet officials in the 1972-85 timeframe in the course of negotiations in SALT II, START, INF, or the Standing Consultative Commission, known as the SCC. Nor does the Senate have access to statements made by United States or Soviet officials during summit meetings, foreign minister-level discussions, or routine diplomatic contacts.

So my statement today is based on what we now have available. There may be more information forthcoming.

I also stress, though, that this is the record that was examined by Judge Sofaer in arriving at his opinion. So to the best of my knowledge, what we have is what he had, and his opinion was derived therefrom.

President Reagan recently directed the State Department to conduct a thorough review of this issue. It is unfortunate that a rigorous administration study of subsequent practice—which has an important bearing on the whole question of treaty interpretation—was not conducted prior to such a major shift in U.S. policy. The administration has indicated that this study will be completed by April 30 and has promised that it will be submitted to the Senate for its review. Once the Senate has had an opportunity to review this second, or subsequent study, consultations will be—we hope conducted on its conclusions.

Mr. President, let me now review the various administration positions which have been put forward on this issue.

In an analysis submitted to the Armed Services Committee in a 1985 hearing, the State Department Legal Adviser, Abraham Sofaer, examined the record of subsequent practices. These conclusions were reiterated in an article which he published in the June, 1986, Harvard Law Review.

In both of these analyses, Sofaer claims that prior to the Reagan administration's announcement of the reinterpretation in October, 1985, the U.S. Government had not held a consistent position on the correct interpretation of the treaty provisions governing mobile/space-based exotics. In short, Sofaer denies that the traditional interpretation is in fact "traditional." Rather, Sofaer insists that the version of the treaty originally presented to the Senate was more consistent with the reinterpretation than the traditional interpretation and that successive administrations fluctuated back and forth between the broader and the more restrictive positions:

> Statements made during the post-ratification period have been mixed. Early statements tended to support the broader interpretation; several later ones presented a more restrictive view, some explicitly. At no time, however, was one interpretation universally accepted.

In support of the reinterpretation, Reagan administration officials have made other claims about subsequent practice. For example, in an appearance before the Senate Armed Services Committee on February 17 of this year, Secretary Weinberger was asked about the treaty's effect on the development and testing of mobile/space-based exotics. The Secretary replied that "you have a situation in which this point was never either specifically considered in the ratification process, nor has it been seriously considered in the years between, because the issue itself never had any importance since no one was on our side working on strategic defense." In short, Secretary Weinberger claims that not only did the issue of restrictions on exotics under the treaty never come up during the 1972 Senate ratification debate, but also that the issue never came up in the intervening years prior to the initiation of the strategic defense initiative [SDI].

The report which I released yesterday totally contradicts the first of Secretary Weinberger's assertions—that is, that the question of the treaty's applicability to the development, testing, or deployment of laser and other exotic ABM systems or components was never addressed during the 1972 Senate ratification proceedings. Today, I will discuss Secretary Weinberger's assertion that the question never arose until work began on SDI, as well as Sofaer's claim that there has been no consistent U.S. view since 1972.

First, let me address U.S. behavior under the treaty. The United States has not tested or developed a mobile/space-based ABM system or component of an exotic design. As late as 1985, the executive branch, in a Department of Defense report to Congress on the SDI Program, expressly endorsed the traditional view of the treaty as the basis for structuring its activities. This pattern of behavior is fully consistent with the traditional view of the treaty.

What about Soviet behavior under the treaty? Neither the Reagan administration nor any of its predecessors has asserted that the Soviet Union has developed or tested a mobile/space-based ABM system or component in contravention of the traditional view of the treaty. No such finding has ever been included in any compliance report submitted by this administration, including the report submitted on March 10, 1987, just 2 days ago.

I have examined the 13-year period from May 26, 1972, until October 6, 1985, with a view toward developing three categories of statements, and this goes to the question of U.S. statements about limitations on so-called exotics. The first category: Those which explicitly support the reinterpretation. The second category: Those which explicitly support the traditional view. The third category: Those which generally address the subject of testifying, development, or deployment of exotics but which do not explicitly support either interpretation.

The first category I will address is those which explicitly support the reinterpretation.

Judge Sofaer has not identified any official statements prior to October 1985 in which the U.S. Government expressly took the position that the treaty permitted testing and development of mobile/space-based exotics—not one statement that I have found.

The second category is U.S. statements that expressly support the traditional view—and there are many such statements. I will name a few of them today.

As noted in my remarks on Wednesday, the Nixon administration clearly took the position in its testimony to the Senate that the treaty banned mobile/space-based ABM's using exotics. This position was announced in public subsequent to the signing of the agreement by the heads of state, but prior to when the treaty entered into force.

With respect to statements made after the treaty entered into force, the available record of both official and unofficial U.S. statements directly contradicts both Secretary Weinberger's assertion that this issue never came up prior to the initiation of SDI and Judge Sofaer's claim that the U.S. position on the issue has not been consistent.

Mr. President, I will give just a few examples.

In 1975, Congress amended the Arms Control and Disarmament Act to require the executive branch to prepare an arms control impact statement for submission with requests for authorization and appropriation of defense and nuclear programs. The first two such submissions, for fiscal year 1977 and fiscal year 1978, were criticized as too general by the chairmen of the Senate Foreign Relations Committee and House Foreign Affairs Committee. A more detailed report was prepared for fiscal year 1979, involving an intensive interagency review process, including final review and approval by the National Security Council. As such, it represented the formal, coordinated views of the executive branch.

The fiscal year 1979 ACIS, which was the first arms control impact statement to address the issue of testing and development of mobile/space-based ABM's using exotics under the ABM treaty, contained the following key passage:

PBWs [particle beam weapons] used for BMD [ballistic missile defense] which are fixed, land-based could be developed and tested but not deployed without amendment of the ABM Treaty, and the development, testing, and deployment of such systems which are other than fixed, land-based is prohibited by Article V of the treaty.

This clear statement by the executive branch severely undermines the reinterpretation because it confirms the traditional meaning of the treaty as provided to the Senate in 1972, which was what I spoke to on yesterday.

The arms control impact statements submitted by the executive branch for fiscal year 1980 through fiscal year 1986, including those submitted by the Reagan administration, consistently took the position that mobile/space-based ABM's using exotics could not be tested and developed under the ABM treaty. I want to emphasize that these statements include express reaffirmation by the Reagan administration of the traditional interpretation. These statements were coordinated between the various departments of government.

The 1985 SDI report, submitted to the Congress in March 1985, contained an appendix on "The Strategic Defense Initiative [SDI] and the ABM treaty." As Sofaer has noted, this document "expressly embraced the restrictive interpretation." This one has been acknowledged by the administration.

It is further confirmation of the traditional view by the Reagan administration.

Let me now discuss several unofficial statements concerning negotiations.

In the years after the ABM Treaty entered into force, several books were published which provided unofficial accounts of the negotiations and descriptions of the meaning of the treaty's provisions. "Cold Dawn: The Story of SALT", published in 1973, was written by John Newhouse, a former Senate Foreign Relations Committee staff member, based on interviews with the participants. It has also been reported that Newhouse had direct access to classified Nixon administration documents. "Cold Dawn", which was widely regarded as the first comprehensive account of the negotiations, contains the following passages concerning exotics:

NSDM 127 [the instructions to the negotiators] banned everything other than research and development of fixed, land-based exotics. There remained to convince Moscow that the great powers should remove exotics future threats to stability, as well as the immediate ones.

* * * * *

Although the basic AMB agreement would be left for an eleventh-hour White House decision, the delegation managed a major breakthrough toward the end of January when the Soviets accepted the U.S. position on exotic systems. Back in the summer, Moscow's attitude, as reflected by its delegation, had been sympathetic. Then, in the autumn, it hardened, probably under pressure from the military bureaucracy. Washington was accused of injecting an entirely new issue. Moscow would not agree to a ban on future defensive systems, except for those that might be space-based, sea-based, air-based, or mobile land-based. The U.S. Delegation persisted and was rewarded. Land-based exotics would also be banned. The front channel had produced an achievement of incalculable value.

In 1974, John Rhinelander, legal adviser to the U.S. delegation, coauthored a book on the SALT accords which contains the following passages relevant to the exotics issue:

Article II defines an ABM system as "currently consisting of ABM launchers, interceptor missiles and radars." The prohibitions of the ABM Treaty are not limited to ABMs with nuclear warheads, although current ABM interceptors are nuclear-equipped. Articles II and III provide the treaty framework for the ban on "future ABM systems," which is spelled out further in an agreed interpretation." [ABM Treaty, Initialed Statement D]

The future systems ban applies to devices which would be capable of substituting for one or more of the three basic ABM components, such as "killer" laser or particle accelerator. Article III of the Treaty does not preclude either development or testing of fixed, land-based devices which could substitute for ABM components, but does prohibit their deployment. Article V, on the other hand, prohibits development and testing, as well as deployment, of air-based, sea-based, space-based, or mobile land-based ABM systems or components, which includes "future systems" for those kinds of environments. The overall effect of the treaty is, therefore, to prohibit any deployment of future systems and to limit their development and testing to those in a fixed, land-based mode.

In 1977, Raymond Garthoff, the Executive Officer of the U.S. SALT I Delegation, published an article in International Security entitled, "Negotiating With the Russians: Some Lessons From SALT". In this article, he made only a cryptic reference to the treaty's limitations on exotics, noting:

Another example concerns the important provisions of the Treaty and associated Agreed Interpretation banning "futuristic" anti-ballistic systems (Article III and Agreed Interpretation [D].

In a letter to the editor published in the next issue of this periodical, a Rand analyst, Abraham Becker, argued that a reasonable reading of agreed statement D indicated that there were no limitations on exotics—including no ban on their deployment. Becker stated,

I am not a lawyer, but "subject to discussion" seems to me to impose no obligation other than, perhaps, to "discuss".

Becker then provided a critique of the traditional interpretation of the treaty which could well be seen as the precursor for the line of argument advanced by Judge Sofaer 8 years later, emphasizing the alleged redundancy of agreed statement D under the traditional interpretation:

One might ask why Agreed Interpretation [D] was necessary at all. Does not the introductory phase of Article III—"Each Party undertakes not to deploy ABM systems or their components except that"—rule out any deployments other than those permitted by the two following paragraphs? Why then is that special provision necessary for the contingency of exotic systems? The answer seems to be that the Treaty's core limitations in Article III relate to a specific form of AMB technology. Thus there was a need to adapt the limitations of Article III to possible future systems using alternative technologies.

However, this raises the more general problem that Article II, Paragraph 1 defines ABM systems for the purpose of this Treaty as consisting of ABM interceptor missiles, ABM interceptor missile launchers, and ABM radars. Presumably, Article V . . . also refers to such systems. There would, therefore, appear to be no prohibitions against developing, testing or deploying any system . . . that does not employ the canonical ABM triad. The only bar to such an interpretation consists of one word in Article II, Paragraph 1— "currently".

In a rebuttal published in the same issue, Garthoff replied as follows:

* * * Becker incorrectly interprets Article V as not applying to futuristic types of systems including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars. The reason for his erroneous interpretation is that he curiously assumes that "the only bar to such an interpretation consists of one word." The same could be said of the Ten Commandments. One word can indeed make a critical difference, and the word "currently" was deliberately inserted into a previously adopted text of Article II at the time agreement was reached on the future systems ban in order to have the very effect of closing a loophole to the ban on futures in both Articles III and V (and several others). The wording of the key introductory sentence of Article III

was also agreed on at the time and for that purpose.

While admittedly the result has a Rube Goldberg air to it, the interlocking effects of the final wording of Articles II and III and Agreed Interpretation [D] was intentionally devised and clearly understood—by both Delegations—to ban future "ABM systems based on other physical principles and capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars" unless specific limitations short of a ban were agreed on under the amendment procedures. The negotiating history fully supports the interpretation given by the Delegation, Mr. Rhinelander, and myself.

The publication of the Becker/Garthoff correspondence in the summer of 1977 set off a flurry of letters between a number of prominent U.S. strategic thinkers and former, as well as then-current, arms control officials, including Rhinelander, Garthoff, Paul Nitze, Donald Brennan (Hudson Institute), Gerard Smith, Paul Warnke, Sid Graybeal, and Herbert Scoville. A consistent theme in these letters was that the ABM Treaty prohibited the deployment of all exotics, and development and testing of such systems was authorized only for those which were fixed, land-based.

For example, in a July 8, 1977, letter to Brennan, Ambassador Nitze said:

The specific format of the Treaty, particularly of Article III * * * was to prohibit deployment of everything not specifically permitted. Future systems and their components could thus only be deployed pursuant to amendment of the Treaty after mutual discussion to work out limits appropriate to such future systems. It is therefore correct that Agreed Interpretation [D] was a work of supererogation and not strictly required.

Ambassador Nitze now asserts that the negotiating record supports the reinterpretation. He is the only principal negotiator who now holds that view. I shall return to this matter in my report on the negotiating record.

On July 13, 1977, Rhinelander stated in a letter to Brennan:

Article V, paragraph 1, prohibits the development, testing or deployment of a sea-, air-, space-, and mobile-land-based ABM systems or components. This encompasses present and future technology.

Finally, in a July 15, 1977, letter, which seemed to put the issue to rest within this circle of experts, Brennan conceded that his initial view of the treaty was incorrect:

In the face this level of analysis, not to mention the essential concurrence of Smith, Nitze and Garthoff, any further insistence that the Treaty does not necessarily ban the development of (among others) space-based exotic systems would have to be reckoned willful, indeed obstinate, stupidity.

Brennan also noted that he had "no reason to believe that the Soviets disagree with our interpretation of the Treaty."

The third category is comprised of U.S. statements supportive of either interpretation.

Let me first mention testimony to the House in 1972. During the House of Representatives' review of the SALT I accords, the question of the applicability of the ABM Treaty to lasers or other exotic ABM's was only raised on a few occasions and never in any detail. In general, statements by executive branch officials that did touch on this issue in the course of House testimony fell into one or the other of the two categories of imprecise or incomplete comments which I discussed yesterday in my report on the Senate ratification proceedings. These two categories are, first, a general statement to the effect that exotics cannot be deployed unless the treaty is amended but which provided no elaboration as to the limits on development or testing; and second, a general assurance that R&D on laser ABM's could continue, but which did not distinguish between fixed, land-based systems and mobile/space-based systems.

For example, on July 25, 1972, Ambassador Smith told the House Armed Services Committee:

An additional important qualitative limitation is the prohibition on the development and testing, as well as deployment, of sea, air, space-based and land-mobile ABM systems and components. Of perhaps even greater importance as a qualitative limitation is the prohibition on the deployment of future types of ABM systems that are based on physical principles different from present technology.

As I discussed yesterday, the reinterpretation presumes that if Smith had believed that the traditional interpretation had been agreed to, he would not have said only that futures were not deployable, he would have said that the development, testing, or deployment of futures was banned.

There are three major problems with the logic on which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of exotics is banned. Second, it attempts to build a major case on what was not said. Third, if Smith had said what the reinterpretation postulates he should have said, he would have been wrong. Why? Because under either interpretation the development or testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the traditional interpretation.

I would note also that Secretary Rogers made a similar statement to the House Foreign Affairs Committee on July 20, 1972.

An example of the second category of statement, including a discussion of research and development, was a July 27, 1972, response by Admiral Moorer, Chairman of the Joint Chiefs of Staff, to a question from Congressman Whitehurst about the treaty's effect on "some kind of technological breakthrough, perhaps something beyond Spartan or Sprint in the state of the art." Admiral Moorer read agreed statement D and then said "there is no restraint on research and development."

Several comments about this reply are in order. First, Admiral Moorer did not differentiate between basing modes, that is, fixed, land-based versus mobile/space-based. Thus under the traditional interpretation, Admiral Moorer's statement is correct as it applies to fixed, land-based laser ABM's. Second, as I mentioned yesterday, the administration, which had been stung by Senator Jackson's criticism of an alleged canceled laser contract, was going to lengths to assure Congress that the then-current U.S. laser ABM Program—which was fixed, land-based—could go forward through the research and development stages. In sum, the statement does not contradict either interpretation; nor does it provide explicit support for this view. Finally, as I noted yesterday, Congress was expressly advised that the Chiefs were aware that the treaty permitted testing and development of exotics only in a fixed, land-based mode, they concurred in that view, and they understood it to be a fundamental part of the treaty.

Turning to postratification statements, in his 1985 submission to the Armed Services Committee, Judge Sofaer identified three cases in which official U.S. reports or statements noted that under the treaty, new ABM systems based on "other physical principles" could not be deployed. The three cases are: An October 23, 1972, speech at the United Nations by Ambassador Bush; the ACDA annual report for 1972; and Secretary Roger's foreign policy report of April 19, 1973. Judge Sofaer does not identify any aspect of these statement that directly addresses testing and development. As with the imprecise and incomplete Smith and Rogers statements which I discussed previously, brief statements to the effect that "exotics can not be deployed," but which are silent on the question of limits on development and testing, cannot be read as compelling any particular interpretation of the treaty.

These statements are totally consistent with either statement, either the broad interpretation or the narrow interpretation or the so-called traditional view or the reinterpretation.

Since 1972, the Arms Control and Disarmanent Agency has prepared five editions of a publication containing the texts of the principal arms control agreements to which the United States is a party, accompanied by brief narrative descriptions of the texts and the history of the negotiations which led to the agreements.

Each edition, including the most recent—1982—contains a paragraph relevant to the issue of exotics. In his 1985 submission to the committee, Judge Sofaer quotes the following excerpt from the 1982 ACDA compilation report:

Should future technology bring forth new ABM systems "based on other physical principles" than those employed in current systems, it was agreed that limiting such systems would be discussed, in accordance with

the treaty's provisions for consultation and amendment.

Judge Sofaer cites this in his review of subsequent practice for the proposition that: "ACDA's periodic compilation of arms control agreements has consistently supported the 'broad' view of the Treaty." He maintains that although the record of U.S. statements between 1972 and 1985 is "mixed," "the one document that tracks the issue over the 1972-1982 period—the ACDA publication "Arms Control and Disarmament Agreements"—appears to reflect that future systems are regulated only by Agreed Statement D."

There are a number of problems with Judge Sofaer's effort to represent this ACDA publication as a definitive and consistent endorsement of the reinterpretation. As with similar statements made during the ratification hearings, the ACDA report does not compel any particular interpretation of the treaty. It is entirely consistent with either the traditional view—under which exotics may be tested or developed in a fixed, land-based mode, which was then the focus of U.S. research—or the reinterpretation permitting testing and development of all exotics. The preface to the ACDA publication underscores the generality of its content, specifically noting that this material provides a "brief narrative discussion" of the treaties contained therein.

Another difficulty—and I would say this is a key difficulty—is that in his 1985 submission to the Senate Armed Services Committee, Judge Sofaer omitted the crucial first sentence of this paragraph which is being heavily relied on in his analysis as a statement which consistently supports the broad view. I would like to share with my colleagues that particular sentence, which was omitted. It reads:

> Further, to decrease the pressures of technological change and its unsettling impact on the strategic balance, both sides agree to prohibit development, testing, or deployment of sea-based, air-based, or space-based ABM systems and their components, along with mobile land-based ABM systems.

This sentence clearly ties to prohibitions in article V of the treaty against testing and development of mobile systems to the goal of decreasing "the pressures of technological change," thereby implying strongly that the treaty prohibits testing and development of mobile ABM systems which would incorporate future technologies. Judge Sofaer reinserted this sentence in his June 1986 article in the Harvard Law Review, but he fails in any way to deal with its implications for his analysis.

I do not cite this sentence as proving the traditional view. But what is amazing about this dialog and this exchange on this point is that the heart of what Judge Sofaer is relying on to support the broader view contains a sentence which he originally left out, and which implicitly supports the traditional view. So what we have here is that the heart of the case for the reinterpretation as it concerns subsequent practice has an omitted sentence which supports the traditional view, and the sentence which is quoted does not support either view. So an amazing sort of legalistic gymnastics is present here.

A more serious problem for the Sofaer analysis is its failure to reconcile the brief, narrative statement in ACDA's compilation of treaties with the executive branch's express treatment of the prohibition on testing and development of mobile exotics in the fiscal year 1979-86 arms control impact statements [ACIS]. This is typical of the case for the reinterpretation in that the brief ACDA narrative, which Judge Sofaer fails to identify as being a brief narrative, is quoted in full in the text, while the directly applicable analysis contained in the arms control impact statement prepared by the executive branch—is merely referenced in a footnote. It is particularly illogical for Sofaer to assert that a periodical compilation of agreements prepared by one agency (ACDA) should be held up as more revealing and authoritative than the arms control impact statements, which were meticulously prepared through a rigorous inter-agency process, including review by the NSC, and submitted, under close congressional scrutiny, on behalf of the President.

In summary, there are three main problems with Judge Sofaer's reliance on the ACDA compilation. First, the statement which he cites does not support the reinterpretation, and that is fundamental. It does not go to the question one way or the other. Second, the compilation does not purport to be a comprehensive statement of U.S. Government policy. Third, a far more authoritative and comprehensive statement is contained in the arms control impact statements, which were submitted to the Congress on behalf of the President for the express purpose of assisting the Congress in making policy decisions concerning the funding of U.S. defense programs.

Turning to the question of Soviet statements, Judge Sofaer does not rely on any Soviets statements in the case for reinterpretation, but notes that the few remarks by the Soviets on the subject are illuminating. He quotes only one Soviet statement, a 1972 speech by Marshall Grechko generally noting that the "Treaty imposes no limitations on the performance of research and experimental work aimed at resolving the problem of defending the country against nuclear missile attack."

Several comments about this statement are in order. First, Marshall Grechko does not define "experimental work."

He did not use the word "development," nor did he refer to "exotics" in that statement.

But even if he had said those words, and to get much out of his statement you have to assume he said those words—which he did not even if he had said "development," and even if he had linked it specifically to "exotics," that statement would have still been entirely consistent with the traditional view because the traditional view permits the testing and development of fixed, land-based ABM's using exotics. Because this statement makes no reference to mobile/spaced-based exotics, it is simply another general statement consistent with either view of the treaty. It does not reflect on one view or the other.

Judge Sofaer also states that the Soviets did not "begin explicitly to articulate the restrictive interpretation" until the new United States position was announced in October, 1985.

Now, that is an interesting bit of information, but it is not particularly helpful to the case for reinterpretation. The Soviets were on notice of United States adherence to the traditional view not only from the ratification debate, but also from the the official arms control impact statements noted above, and as far as available information shows, they made no objection to the traditional view of the treaty.

In other words, why should the Soviet Union have, prior to 1985, protested and said that we were, in effect, implementing the broad view when we were not and when during that whole period our own official publications said we were adhering to the traditional view.

So I do not think there would really have been a burden on them to comment during that time frame.

Finally, the administration has not provided any information to date demonstrating Solviet practices or statements expressly embracing the reinterpretation. Given the Reagan administration's repeated endorsement of the traditional interpretation in the annual Arms Control Impact Statements it submitted prior to October 1985, any violations of that view presumably would have been brought to the public's attention.

It is possible, of course, that the new administration review which is now under way will uncover some heretofore unknown Soviet activities or statements. I do not in any way contend I know everything the Soviet Union has said on this subject. We will have to rely on the administration for that as a source.

I am only commenting on what we know that has been submitted by the administration. It must be remembered, however, that subsequent statements and practices constitute evidence to be used on treaty interpretation but the context of the practices or statements is crucial. So we will not really be able to examine any statements we may be presented unless we see the overall context. If such evidence is unearthed by the administration, it would certainly have to be

weighed carefully in light of all relevant facts and circumstances.

Mr. President, in a speech which I intend to present tomorrow I will turn to the final element in this reinterpretation controversy, and that is the question of the treaty negotiating record itself.

Mr. COCHRAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEVIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. Mr. President, first, while my friend from Georgia is still on the floor, I commend him for the extraordinary effort that he has put into this analysis of the ABM Treaty. He is, as we all know, a Senator of immense distinction and we all put great credence in his word, in his intellectual powers, and in his integrity.

He is performing a function here for the Senate and for the country which nobody else really could perform as well.

I commend him, and we all are indebted to him for what he is doing.

Mr. NUNN. Mr. President, if the Senator from Michigan will yield briefly, I thank him for his kind remarks. I must say the Senator from Michigan was out in front of the Senator from Georgia on this one and has spent a lot of time, and the Senator from Michigan made a report himself which was of great help to me in preparation of my remarks and material.

I thank the Senator for his leadership and kind words.

Mr. LEVIN. I thank the Senator.

Mr. President, after reviewing the ABM Treaty issue, which I have been doing over the period of a year and a half, last December 1, I sent Secretary of State Shultz a detailed critique of the analysis of the ratification proceedings which had been prepared by Judge Sofaer and which the administration has been using to justify the new broad interpretation of the ABM Treaty. That analysis was presented publicly to the Senate in the form of an October 1985 memorandum and in the public testimony of Judge Sofaer before the Armed Services Committee of the Senate.

Now, in a response that was released to the press by the State Department the same day that I sent my December 1986 letter to Secretary Shultz, the State Department defended Judge Sofaer's evaluation as "a thorough, balanced analysis of the issues, more objective and complete than any prior study of the subject." In a letter to me on December 18, 1986, Assistant Secretary of State J. Edward Fox again defended Judge Sofaer's memorandum as reflecting "a thorough, objective review" which had been "carefully reviewed by appropriate officials in this Department, as well as by the designated representatives of other agencies." Mr. Fox rejected my criticisms, claimed that "(m)ost of the questions you now raise were discussed during congressional hearings and more than adequately answered," and invited me to meet with Ambassador Nitze and Judge Sofaer to discuss ABM Treaty issues.

I have taken them up on that offer, but it was not until this morning that the meeting could be arranged.

In my office today, Judge Sofaer explicitly and repeatedly disavowed the October 1985 memorandum regarding the ratification record of the ABM Treaty. He described it as an incomplete review of the ratification record which was prepared by young lawyers on his staff. He said he did not stand behind that memorandum, or those parts of his testimony before House and Senate committees based on that memorandum.

I must note three other points:

One, Judge Sofaer determined that the further review he is now conducting at the direction of the President will withstand public scrutiny.

Two, he has not changed his mind about the validity of the new interpretation of the treaty.

Three, he continues to defend the August 1986 classified memorandum analyzing the negotiating record, which is part of the documents located in the Capitol. That is a classified, private memorandum.

Mr. President, it is almost a year and a half since Judge Sofaer publicly presented to the Senate his memorandum relative to the ratification proceedings which gave support to a radical new interpretation of the ABM Treaty. Only now does he acknowledge that it was, at best, incomplete and that he failed to exercise his obligation to make sure that it was correct. His new found candor is welcome, however belated that it is. But I must say that I find that the way in which this matter was handled was inappropriate for the State Department's senior lawyer.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HEINZ. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SIMON). Without objection, it is so ordered.

TRADE ADJUSTMENT ASSISTANCE FUNDING

Mr. HEINZ. Mr. President, I rise to address this body on the subject of trade adjustment assistance. At the outset, I would like to explain that the Trade Adjustment Assistance Program represents the best effort that we have ever had, although not a perfect effort, by any means, to return workers who have lost their jobs due to imports—trade impacted workers, if you will—to meaningful employment. It is a flexible program which trains workers. It makes them eligible for training right up front and thereby it provides early action. It provides cash assistance to keep workers alive, for them to make ends meet while they retrain for new employment.

It does all the things that the President and the Congress and most outside experts say that we ought to do if we want to retrain somebody who has become unemployed through no fault of his own. It is the model displaced workers program.

Under this program, the Trade Adjustment Assistance Program, when a layoff or plant closing is a result of foreign competition, workers of the affected plant go through a certification process and they are certified for trade adjustment assistance benefits. And those benefits include up to 52 weeks of cash assistance, plus retraining, job search, and, if necessary, relocation assistance if the job that they find is a good distance away.

Now, that sounds spectacular, and when it works, it is. But it is only at this moment the sound that is nice because retraining skilled workers, however nice that may sound and however critical a component of our international competitiveness it may be, is at this moment totally meaningless. It is meaningless because the program that I have just described, the program that has been working, this process and support system that has given hope for a new life to so many workers, is totally out of money as of yesterday.

All of the funds available for training trade-impacted workers are gone as of this week. The fiscal year is only one-half over and we have spent all, every penny, of the $30 million made available in last year's continuing resolution for trade adjustment assistance training.

Workers—that includes in my home State of Pennsylvania textile workers, steel workers, mine workers, oil and gas workers, countless other workers, and maybe I should say former workers—who attempt to enroll in training programs this week or next week or next month or next summer when summer session starts are going to find that they are up against a locked door. The door is going to say we are out of business until Congress gets up and does something. They are all going to be turned away because we are doing nothing.

It is not the first time Congress has done nothing in the midst of a crisis but I suppose what makes it particularly poignant and difficult to bear is that we are talking as if we are doing a lot on the floor of this Senate.

Mr. President, every day we hear speeches, remarks, references to how important it is for this country to be competitive, how vital it is that we

train our workers, how important it is that we do a better job of reeducating people who are falling by the wayside. We are long on rhetoric and we are short, woefully short, on action.

I say that it is time we put some money—not a lot of money, $2 million, but let us put some money—where our mouths are. A new worker retraining initiative in fiscal year 1988 as the administration proposes, or an expanded Trade Adjustment Assistance Program as the Finance Committee's draft trade bill proposes, does not mean anything to workers who are eligible for, who have a right to, and who want training right now.

Once we turn the workers away from the State employment offices where they have been going and will be going for help, the ball game is pretty much over. It is very doubtful if we will ever get them back again. And in addition, as I suspect, Mr. President, most of my colleagues realize the Trade Adjustment Assistance Program is a program with a time limit.

A worker has only a total of 104 weeks from the time he is laid off to collect benefits before his eligibility period expires. That sounds like a lot of time. But if you are going to have a worker who has been unable to get into the program this week or next month and they start looking for work elsewhere, and they do not come back and check to see that the program is reinstated for another year, a year-and-a-half, maybe, during which time they have some kind of minimum-wage job at McDonald's or at the 7-11 checkout counter, they stand in grave jeopardy of having most of the time in which they might get training be used up. In the end, they will simply not have the time to get the training that they were originally eligible for.

Let me just ask our colleagues, Mr. President, if they really think this is how we are going to return our skilled workers—and these workers I have referred to are among the most skilled, most motivated, best workers in our economy—is this how we are going to get them back into productive employment? Is short-funding, our only meaningful training program, going to enhance our international ability to compete? I will tell you what my answer to that question is, Mr. President. My answer is that we need supplemental funding for this program, and we need it now. We need it right away.

As I mentioned, we are not talking about a great deal of money. The training was only funded at $30 million last year to begin with. We are going to require—and we will need almost—that much again if this program is going to at least stagger through the remainder of the fiscal year. States, I might add, have tried to cut costs in this program. Unfortunately, when States have tried to cut the costs in this program, they have usually done it at the expense of the very people they are supposed to help, the workers themselves.

What happened was this January and February as funds ran low the State employment security offices turned away countless workers who sought higher cost training such as pilot training, engineering, the higher skills programs that would add something to this increasingly high-tech economy that is evolving.

Mr. President, the crisis—believe me, it may not seem like a crisis to all the people in Washington who have secure Government jobs, Members of this and the other body included—but the crisis that is facing one, let alone tens of thousands of import-impacted workers right now, gives lie to our rhetoric about competitiveness. If I hear that word once a day, I hear it a thousand times. Furthermore, it convinces those very workers that we say we are trying to help that we just do not care. The only way to address this impending human disaster is to appropriate the almost infinitesimal amount of money to fund the program—infinitesimal, not that $30 million is not a lot of money judged by the way any normal individual would reckon it. But in a $1-trillion budget—that is where we are—it is truely infinitesimal, and Mr. President, I hope my colleagues have listened to the problem. I hope they understand it. But even more than their understanding and their listening, I hope they join with those of us who care in doing something about it.

Mr. President, I ask unanimous consent that a letter I sent to Secretary of Labor Brock on this subject quite some time ago be printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC, March 2, 1987.

Hon. WILLIAM BROCK,
Secretary, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC.

DEAR BILL: I am writing to bring to your attention an imminent crisis in the Trade Adjustment Assistance program (TAA). As of February, only some $5 million remained available for job search assistance, relocation assistance, and training under TAA. Because the Department considers job search and relocation assistance to be entitlements, state requests for training will either be denied or reduced in the immediate future.

As a result, thousands of workers may be denied training in the very near future. I do not believe this is something you want, or that such a disaster would be consistent with the Administration's competitiveness policy.

I am asking you to request an urgent supplemental appropriation for Trade Adjustment Assistance. I do so recognizing the Administration's desire to eliminate TAA and replace it with a new Worker Adjustment Act. Because Congress will not be able to act upon the issue of worker adjustment until well after TAA money has run out, I believe it is only fair to provide existing programs with the resources they need to operate. Some may suggest that states reprogram JTPA funds to TAA. This sounds fine on the surface, but Congress, at the Administration's request, substantially reduced JTPA funds for the current program year. Reprogramming is not an option in most states.

If the Administration now supports enhanced training, I cannot believe that we will allow training programs which are now underway to be terminated. I stand ready to assist you in this matter, and would like to discuss the problem personally, at your earliest convenience.

Sincerely,

JOHN HEINZ,
U.S. Senate.

Mr. HEINZ. Mr. President, I yield the floor.

FOREIGN COMPETITION

Mr. COCHRAN. Mr. President, this morning in our Subcommittee on Agriculture, which has jurisdiction over trade legislation and promotion of marketing, both domestic marketing and foreign marketing, of agricultural commodities, we held a hearing looking into the suggestions of people who are directly involved in agricultural trade, suggestions that they may have on improving our competitive situation in the marketplace.

As everybody knows, there is no higher priority of this Congress or our Federal Government this year than trade. The $170 billion deficit last year in our balance of trade clearly illustrates that something is wrong and action ought to be taken to correct the problem.

I am hoping that we can see a cooperative venture develop between the administration and the Congress on this issue. I am encouraged that it is possible.

I think there are several suggestions that have already been made in the form of legislation introduced by the chairman of the Finance Committee, Senator BENTSEN of Texas. It has several components. I have joined in cosponsoring that bill and also the agriculture title of that bill, which was the subject of the hearing this morning in the Agriculture Committee.

I have also joined in sponsoring the antitrust reform initiative that is contained in the administration's competitiveness package that has been submitted to the Congress. I feel very strongly about this title, title II, of that legislation. Senator THURMOND, I believe, is the principal sponsor of that legislation.

I think insofar as the bill deals with section 7 of the Clayton Act, it really deserves the careful and prompt attention of the Judiciary Committee, which I know has already begun a review of this issue. Hearings have been held in the past and I understand are being held again to look at the questions raised by this legislation.

I think we need to make some changes in our existing law in this area as a part of a trade package because I think that our current statutes and regulations are adversely affecting American business and industry as it

compel the testimony of North and Poindexter.

My experience as a district attorney in Philadelphia for some 8 years has given me background on the operation of limited-use immunity, and succinctly stated, Mr. President, the only limitations on prosecution from such limited-use immunity is that the testimony of North and Poindexter, or leads from that testimony, may not be used in a criminal prosecution against them. But evidence which is gathered independently may be used in such a criminal prosecution.

During the Watergate investigation evidence was compiled and sealed prior to the time that limited-use immunity was granted to witnesses in those proceedings, and then there was no question of taint as to the evidence which was in existence and sealed with the court prior to the time that those witnesses testified.

That same procedure can be followed as to North and Poindexter. If in fact there are criminal prosecutions, that evidence could be drawn together in a relatively brief period of time which the independent counsel would have under the operation of the statute. Under the statute the independent counsel is entitled to 10 days' notice, and the court has the discretion to limit the pursuit of the immunity for an additional period of 20 days. The independent counsel has had a protracted period of time to conduct and investigate, and there are facts of record.

This matter was considered, Mr. President, by the Intelligence Committee during the month of December. There were some of us on the Intelligence Committee who felt that time that it was in the public interest to proceed as promptly as possible with the full exploration of all of the facts on the Iran-Contra matter because of the importance of finding the facts, getting to the bottom of it, letting the chips fall where they may, assess blame, assess criminality, and move on to the important business of the Government.

These competing interests, Mr. President, between special prosecutor and the Senate investigating committee were thoroughly considered during the Watergate era, and in that time, Special Prosecutor Archibald Cox objected to the grant of immunity by the Ervin committee, headed by Senator Ervin. The courts ruled that the public policy interests of the congressional investigating body, the Senate select committee, took precedence over the interests of the prosecution.

For a time, Mr. President, the entire Government of the United States virtually was run out of the Intelligence Committee hearing room when we had a procession of witnesses including then Chief of Staff Don Regan, Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, Attorney General Edwin Meese, and many other Federal officials. There continues to be a significant preoccupation with the Iran-Contra matter and there are disclosures almost on a daily basis with renewed allegations that the President may have known about the diversion of funds to the Contras.

These issues are of paramount importance to the operation of our Government, and these issues should take precedence with the Senate select committee.

It is really a matter of the tail wagging the dog, with the independent counsel insisting that he be given a protracted period of time to complete his investigation. Not only is the tail wagging the dog, but the tail is wagging the country.

That is why I am submitting this sense-of-the-Senate resolution, Mr. President, because I think the national public interest requires that all of the facts be disclosed on the Iran-Contra matter at the earliest possible time, especially since the criminal prosecutions against North, Poindexter, and others can be maintained at the same time.

Mr. President, I ask unanimous consent that the text of the resolution be printed in the RECORD.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

S. RES. 165

Whereas, the Nation's interests demand full disclosure at the earliest possible time regarding the sale of arms to Iran and the diversion of funds to the Contras; and

Whereas, the courts have established that the Congressional interest in eliciting testimony must, in the event of conflict, take precedence over the interests of prosecutors; and

Whereas, prosecutions of key witnesses can, in any event, be preserved by sealing all relevant evidence prior to a grant of limited use immunity; and

Whereas, the testimony of Admiral John Poindexter and Lt. Col. Oliver North is indispensible to a full explanation of the Iran/Contra matters; Therefore be it

Resolved, That it is the Sense of the Senate that the Senate Select Committee investigating these matters should promptly grant limited "use" immunity to Admiral Poindexter and Lt. Col. North, so that their sworn testimony can be compelled.

ORDER OF PROCEDURE

Mr. BYRD. Mr. President, under the order of yesterday, when the orders for the recognition of Senators, each for not more than 5 minutes, were completed today, Senators were to be permitted to speak out of order for not to exceed 30 minutes.

Senators who were to be recognized under the 5-minute orders are not on the floor. I would express hope that always in the future when Senators have 5-minute orders, they be on the floor ready to claim their recognition as has been programmed. Otherwise, the Senate does have to move on with the rest of the program because I do not care for these exceedingly long quorum calls which sometimes occur when we cannot get Senators to come to the floor.

I therefore ask that that part of the order which was for the recognition of Senators to speak out of order for not to exceed 30 minutes each proceed at this time since no Senator with a 5-minute order is on the floor at this time seeking recognition.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BYRD. I ask unanimous consent that that period for speaking out of order not extend beyond 2 p.m. today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BYRD. I thank the Chair.

Mr. NUNN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Georgia.

INTERPRETATION OF THE ABM TREATY

PART ONE: THE SENATE RATIFICATION PROCEEDINGS

Mr. NUNN. Mr. President, let me first thank the majority leader for making some time available to me today. I have a rather lengthy presentation that will bore some people to tears but which is very important from the point of view of the Senate as an institution and from the point of view of our interpretation of the ABM Treaty.

Unfortunately, I also have a case of laryngitis so my presentation may not be as clear as would otherwise be the case. I apologize to my colleagues for that.

Mr. President, today we have ongoing a hearing under the auspices of the Foreign Relations Committee and the Judiciary Committee. I will be testifying on this same subject around 2 o'clock this afternoon at that hearing. I believe Senator BIDEN will be chairing the hearing. It started this morning.

I think it is appropriate that those two committees be linked in having a joint hearing today because they are considering a very important treaty, and treaties are not only of central importance in our foreign policy, and, therefore, of interest to the Foreign Relations Committee, but they are also the law of the land and should be of interest to all of us, especially the Judiciary Committee.

Furthermore, the Reagan administration's unilateral interpretation of the ABM Treaty constitutes a fundamental constitutional challenge to the Senate as a whole with respect to its powers and prerogatives in this area. The seriousness of this challenge has been further underscored in recent weeks by the administration's new claim that testimony during Senate treaty ratification proceedings "has absolutely no standing" in terms of establishing other parties' obligations

under these treaties. In effect, the Reagan administration is telling the Senate not only that the executive branch is free to ignore the meaning of the treaty as originally described in the Senate of the United States, but also that other nations who are party to such treaties can disregard what the executive branch told the Senate at the time of ratification.

I am certain that this novel doctrine will receive close scrutiny during the hearings before the Foreign Relations Committee and the Judiciary Committee.

Mr. President, before I present the results of my review of 1972 Senate ABM Treaty ratification proceedings, I believe that a few comments are in order about the overall context in which the Senate must consider the ABM reinterpretation issue.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. The treaty was accepted in 1972 by the Nixon administration and the United States Senate on the assumption, first, that the Soviet Union would strictly observe its terms, and second, that significant reductions in strategic offensive arms would be accomplished within 5 years.

Neither expectation has been fulfilled. The Soviets have not restrained the relentless expansion of their strategic offensive forces. Their massive investment in strategic defenses, primarily air defenses—while not a violation of the ABM Treaty—does contradict the spirit of the agreement; that is, that both sides recognized and accepted in 1972 that there can be no shield against retaliation. And violations such as the strategic Krasnoyarsk radar undermine the integrity of the agreement.

In light of these circumstances and considerations, the Soviet Union must recognize that the United States commitment to the ABM Treaty cannot be deemed unalterable or open-ended—whether or not the traditional interpretation of the treaty is upheld. If arms control or unilateral strategic modernization efforts—such as moving to mobile ICBM's—fail to restore stability to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control and communications. Unless the ABM Treaty could be amended by mutual agreement to permit such deployments, which would require approval of both parties, this action would necessarily require the United States to exercise its right under the supreme national interest clause of the treaty to withdraw on 6 months notice.

Certainly a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not counseling this course at this time. Nonetheless, the American public and our allies need to understand that if we cannot solve curent strategic vulnerabilities through arms control or our own strategic programs, we may have no recourse but to consider deploying some form of strategic defense, in the future.

Second, those who support the reinterpretation of the ABM Treaty in the name of accelerating the SDI may be laboring under a fundamental and erroneous misimpression. There is a strong case that the specific SDI early deployment system now favored by Secretary Weinberger cannot be developed or tested under either intepretation.

This requires a rather complicated explanation which I will not go into at this time, but it is not at all certain, in fact I would say the evidence is leaning against it, that even the broad interpretation of the treaty would permit the testing and development of the so-called space-based kinetic-kill system that is now apparently favored for early deployment.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements miss the point: there are other, more honorable responses available to the United States. These include; first, insisting that the Soviets correct the violations; second, proportional U.S. responses; and third and last, abrogation of the agreement.

For 200 years, the United States has stood for the rule of law as embodied in our Constitution. The reinterpretation issue must be approached not with an eye toward near-term gains, but rather with a decent respect for the long-term interests of the rule of law and the continued integrity of this Constitution—that magnificent document whose 200th birthday we celebrate this year.

Mr. President, the record of the ratification proceedings before the U.S. Senate in 1972 supports, in my view, the following conclusions about the scope of the treaty.

First, executive branch witnesses clearly stated that development and testing of mobile space-based exotics was banned while development and testing of fixed land-based exotics was permitted. Key Members of the Senate, including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley, were directly involved in the dialog and debate concerning the implications of the treaty which the record indicates they clearly understood to ban testing and development of mobile space-based exotics. I think a few examples of this are very important and in order here.

The question of exotics was raised in the first Senate hearing that considered the treaty. Senator Goldwater, in a question for the record to Secretary of Defense Laird, noted that he had "long favored" moving ahead with space-based ABM's capable of conducting boost-phase intercepts using "shot, nuces (sic.), or lasers," and asked whether it was correct that nothing in the treaty "prevents development to proceed in that direction."

The written reply from DOD distinguishes between development of fixed, land-based ABM's—which is permitted by the treaty—and this is extremely important, very complicated, but it is the key to this overall consideration—and development of mobile/space-based ABM's, which is prohibited. The reply from Secretary Laird expressly related these provisions to lasers, which in our terms today would be considered an "exotic" ABM component.

REPLY OF SECRETARY LAIRD TO QUESTION FROM SENATOR GOLDWATER

With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems. There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components. There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with Article XIII (Standing Consultative Commission) and agreement in accordance with Article XIV (amendments to the treaty).

This statement is particularly significant because it embodies a formal, written executive branch response. It clearly sets forth the traditional interpretation of the treaty with respect to exotics, permitting development, and testing only in a fixed, land-based mode. The reply makes it clear that mobile/space-based exotics are subject to the comprehensive ban on development, testing, and deployment, with the understanding—as stated in Secretary Laird's reply—that the treaty only permits "basic and advanced research and exploratory development."

It is also noteworthy that the reply clearly links the ban on development of mobile/space-based ABM laser systems to article V of the treaty. Article V contains a comprehensive ban on mobile/space-based, ABM systems. Secretary Laird's express linkage between mobile/space-based exotics and article V directly refutes the reinterpretation's analysis of the treaty's text, which asserts that article V applies only to components existing in 1972; that is, missiles, launchers, and radars.

The detailed executive branch reply was omitted from an October 30, 1985, analysis of the ratification debate submitted to the Senate Armed Services Committee by Sofaer on November 21, 1985. This omission was brought to the attention of the committee on January 6, 1986, in a letter from John

Rhinelander, the legal adviser to the U.S. SALT I delegation. In a subsequent analysis of the ratification debate published in the June 1986 Harvard Law Review, Sofaer conceded in a footnote that the DOD reply to Goldwater supports the traditional interpretation.

The second example is an exchange between Senator Henry Jackson and DOD's Director of Research and Engineering which confirmed the treaty's ban on testing and development of mobile/space-based exotics. During the Senate debate on the SALT I accords, which included the ABM Treaty, the late Senator Henry Jackson, a senior member of the Armed Services Committee, conducted a rigorous inquiry into the agreements, with a profound impact on the conditions of Senate acceptance. From the outset, he exhibited a keen sensitivity to the issue of exotics by focusing on laser ABM's. For example, just 5 days after the treaty's signing, he made a statement sharply citical of the Army's reputed cancellation of a research contract involving laser ABM's

When Secretary Laird came before the committee on June 6, 1972, he quickly assured Senator Jackson that no such contract had been canceled. When Senator Jackson asked about ABM Treaty limits in this area, Secretary Laird gave a general reply—noting only that "research and development can continue, but certain components and systems are not to be developed"—without getting into the distinction between fixed, land-based systems and mobile/space-based systems.

Senator Jackson pursued that distinction in June 22, 1972, hearing during testimony by Dr. John Foster, Director of Defense Research and Engineering, and Lt. Gen. Walter Leber, the program manager of the Army's Safeguard ABM system. This hearing involved a careful discussion of treaty's limits regarding development of ABM's using exotics, with a specific focus on the distinction between fixed, land-based systems and mobile/space based systems.

Senator Jackson began by noting that there were limitations in the treaty on lasers and then asked whether the agreement prohibited land-based laser development? Dr. Foster replied, "No sir; it does not." The text of the printed hearing reads as follows:

LASER ABM SYSTEM

Senator JACKSON. Article V says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based, space based or mobile land based.

Dr. FOSTER. Yes sir, I understand. We do not have a program to develop a laser ABM sytem.

Senator JACKSON. If it is sea based, air based, spaced based or mobile land based. If it is a fixed, land-based ABM system, it is permitted; am I not correct?

Dr. FOSTER. That is right.

Senator JACKSON. What does this do to our research—I will read it to you: section 1 of article 5—this is the treaty: "each party undertakes to develop"—it hits all of these things—"not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".

Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile.

Senator JACKSON. You can't even test; you can't develop.

Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based. My understanding is that you can develop and test but you cannot deploy. You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

When Senator Jackson suggested that even research on ABM lasers might be prohibited, Dr. Foster said, "No." Interposed between Senator Jackson's question and Dr. Foster's answer is the following insert for the RECORD:

Article V prohibits the development and testing of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based. Constraints imposed by the phrase "development and testing" would be applicable only to that portion of the "advanced development stage" following laboratory testing, i.e., that stage which is verifiable by national means. Therefore, a prohibition on development—the Russian word is "creation"—would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or bread-board model.

The importance of this submission as an authoritative statement of Nixon administration policy is underscored by the original transcript of this hearing which is currently maintained in the Armed Services Committee archives. This transcript reveals two key points. First, Dr. Foster pledged to submit the insert after Senator Jackson had declared that "we had better find out" exactly how the treaty applied to research and development in this area. Second, the transcript reveals that Dr. Foster declared that in order to clarify this issue, the submission would reflect a detailed review of the negotiating record.

In other words, Dr. Foster promised Senator Jackson before he gave his written answer that he would go back and review the negotiating record. And this is the top man in the scientific arena in the Department of Defense.

The unedited exchange reads as follows:

Dr. FOSTER. I think you can engage in research or development of laser land-based ABM systems; you cannot deploy them as a kill mechanism against ICBMs.

Senator JACKSON. Well, that is something we had better find out about it. I would [sic.] you would——

Dr. FOSTER. I would be glad to go through the record, Senator Jackson, in some detail and try to clarify this.

As is the normal practice in editing congressional hearings, the comments about what was to be submitted for the record was deleted and replaced by the actual submission.

Several observations about the extensive exchange between Senator Jackson and Dr. Foster deserve emphasis. First, this exchange in the record includes a formal, written submission, which provided the executive branch with an opportunity to prepare an official coordinated statement after review of the negotiating record. As such, it clearly represents an authoritative statement of the administration's position. Second, the fact that the statement refers to article V—the treaty's ban on testing, development, and deployment of mobile/space-based ABM's—in the context of lasers again refutes the reinterpretation's premise that article V does not apply to ABM's using exotics.

The Jackson-Foster exchange directly contradicts the reinterpretation of the treaty. The credibility of the Sofaer analysis is further undermined by the distorted manner in which it treats this crucial dialog between a leading Senator and high-level Nixon administration witness. For example:

The version of this extensive Jackson/Foster exchange presented in Sofaer's October 1985 analysis of the ratification proceedings and in Sofaer's June 1986 Harvard Law Review article advocating the reinterpretation is greatly abbreviated. While the reinterpretation acknowledges that Dr. Foster's comments support the traditional interpretation, the only portion of the entire exchange which it cites is the following:

Dr. FOSTER: One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile . . . You can develop and test up to the development phase of future ABM system components which are fixed and land based.

Dr. Foster's explicit confirmation that development and testing of space-based, or mobile land-based laser ABM's was prohibited is omitted in the reinterpretation. There is also no mention in the reinterpretation of Foster's written submission nor its linking the discussion of limits on laser ABM's to article V.

Dr. Foster, a Presidential appointee, was the highest ranking technical official, and third-ranking civilian in the Defense Department. He had served in his position since 1965. Nonetheless, the Sofaer analysis tries to disparage his testimony by stating Foster was "not involved in the drafting or negotiation of the treaty." The suggestion that the Director of Defense Research and Engineering would not have acquainted himself thoroughly with the treaty's effect on programs under his supervision prior to representing the administration before the Armed Services Committee is absurd. At any rate, as discussed above, the transcript con-

firms that Dr. Foster's written submission was based on a detailed review of the negotiating record.

I also find it interesting, Mr. President, that in making his analysis, Judge Sofaer has not to the best of my knowledge interviewed those who were responsible for negotiating this treaty with the exception of Paul Nitze, a very respected individual who works for this administration. So by virtue of his reference that Dr. Foster was not a negotiator you would think, if this was important, there would have at least been interviews with those who were negotiators. But we have had this reinterpretation rendered with such interviews not having occurred even to date; with the exception of Paul Nitze.

Sofaer's account of the exchange excises Senator Jackson's half of this dialog in its entirety. As a result, anyone reading this analysis would not know that Senator Jackson had acquired a detailed understanding of the treaty limits in this area or, indeed, that the Senator took the lead in drawing out of the witness explicit confirmation of these restrictions.

As a result of this omission, the only mention of Senator Jackson in Sofaer's October 1985 analysis of all of the Armed Services Committee's ratification hearings is in a discussion of a hearing on July 19, 1972. In a summary comment on Senator Jackson's July 19 statements, the reinterpretation concludes: "Fairly read, Senator Jackson's comments do not address future systems."

Mr. President, this is perhaps the most egregious omission and misinterpretation that I have come across in the entire record.

By omitting the extensive June 22 Jackson/Foster exchange on laser ABM's—as well as other instances when Senator Jackson querried witnesses on the question of laser ABM's, including a highly classified session on June 26 with CIA Director Richard Helms—the reinterpretation is then able to claim in a paragraph summarizing all congressional hearings during the ratification proceedings that "Senator Jackson's comments do not appear to address future systems." Sofaer's assertion that Senator Jackson never addressed the question of limits on laser ABM's during the entire Senate debate on the ABM Treaty is flatly and unequivically contradicted by the record of the debate.

In the third example is a July 19 exchange with Senator Jackson, in which General Palmer confirmed that the JCS supported the limitation under which testing and development of exotics was restricted to fixed, land-based systems. The record of this Armed Services Committee hearing not only repudiates the claim that Senator Jackson did not address future systems, it also contains a crucial passage confirming the Joint Chiefs' understanding of the difference between fixed, land-based and mobile/space-based exotics in terms of the restrictions on development and testing.

This hearing involved an extensive exploration of treaty's limits on exotics; focusing on laser ABM's. The key exchange occurred between three Senators: Goldwater, Jackson, and Dominick, and three executive branch witnesses: General Ryan, Chief of Staff of the Air Force, General Palmer, Acting Chief of Staff of the Army, and Lieutenant General Leber, project manager of the Safeguard ABM Program. This exchange covers seven pages of the printed hearing. During this exchange, the word "laser" was used 13 times; descriptions of or references to lasers were made 6 other times, and the phrase "futuristic systems" was mentioned 3 times.

During the same hearing, Senator Jackson also questioned the witness about General Palmer's broad statement that the treaty "does not limit R&D on futuristic systems." Senator Jackson, expressing concern about the generality of this response, drew the witnesses' attention to article V's prohibition on development of mobile ABM systems. General Ryan noted the distinction between permissible development of fixed, land-based systems and the prohibited development of mobile/space-based systems. Finally, General Palmer provided an authoritative statement on the prohibition on development of mobile/space-based exotics.

How anyone cound have omitted this in a presentation about the Senate record escapes my own sense of logic. I will not read it in its entirety; but it is included in my full report which I will put in the RECORD.

Sofaer's analysis of this discussion omits Palmer's crucial closing comment that the JCS were aware of the limits on development and testing of laser ABM's, had agreed to them, and recognized that this was a fundamental part of the final agreement. Thus, the record demonstrates that Sofaer's assertion that Senator Jackson did not address the question of exotics during the ratification debate is a complete and total misrepresentation. It also underscores the inadequacy of its analysis by its omission of this additional, and authoritative, confirmation that the treaty banned the development and testing of all but fixed, land-based exotics.

It is also noteworthy that Senator Jackson and the executive branch witnesses clearly cited the prohibition on testing and development of mobile/space-based systems in article V of the treaty as the authority for the prohibition on testing and development of missile/space based ABM using exotics. This further undermines the reinterpretation's analysis of the treaty's text in which it asserts that article V should not be read as applying to mobile/space-based exotics.

Mr. President, the reinterpretation is based on two categories of incomplete, imprecise, or general statements—those which indicate that exotics cannot be deployed and those which indicate that R&D on lasers is permitted. However, each of these statements can be read as consistent with either the traditional interpretation or the reinterpretation. This is extremely important, because it is the heart of the case for reinterpretation so far as the Senate record is concerned.

In the reinterpretation, much is made of brief statements to the effect that the deployment of exotics is banned. For example, during his May 26, 1972, press conference, Ambassador Smith said, "future systems * * * will not be deployable unless this treaty is amended." The reinterpretation reads this statement as supportive of its case, arguing that, "It is unlikely that Ambassador Smith, the negotiator of the treaty, would have referred to only a ban on deployment if he had meant testing and development were banned as well."

Smith's statement that the deployment of exotics is banned is, however, fully consistent with the traditional interpretation. Nonetheless, the reinterpretation suggests that since Smith cited the ban on deployment of exotics but omitted any mention of a ban on their development or testing, then he must have believed that the treaty gave a green light to such activities; that is, that he would have gone on to say, had he voiced his opinion on this issue, that the treaty permits the development and deployment of all exotics. This is a very important part of the argument.

In short, the reinterpretation presumes that if Smith had believed that the traditional interpretation had been agreed to he would not have said simply that "future systems * * * will not be deployable unless this treaty is amended"—he would have said that "future systems will not be developed, tested, or deployed unless this treaty is amended."

There are three major problems with the logic upon which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of future systems—that is, exotics—is banned. Second, it attempts to build a major case on what was not said. Third, if Smith had said what the reinterpretation postulates he should have said, he would have been wrong. Why? Because under both the traditional interpretation and the reinterpretation, the development and testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the traditional interpretation.

In other words, if Ambassador Smith had said exactly what the reinterpretation theory infers he should have said he would have been incorrect, because he would have been including land-based and mobile-based systems

when one was treated differently from the other.

Under the logic of the reinterpretation, to prevent his remarks from being distorted in the future and, at the same time, ensure accuracy, Smith would have had been compelled to turn his brief sentence into something resembling the following. This is not Ambassador Smith speaking. This is my interpretation of what he would have had to say if he were going to avoid reinterpretation of his remarks 15 minutes later and if he were going to be entirely accurate.

Future systems (i.e., exotics—whether fixed, land-based or mobile/space-based—will not be deployable unless the treaty is amended. Future fixed, land-based exotics may be developed and tested, but only at the agreed test ranges as established under Article IV. Future mobile/space-based exotics may not be developed or tested at all in accordance with Article V.

Mr. President, I am not certain that either the people listening or those at a news conference would have sat still long enough to hear that every time there was a discussion of banning the deployment of exotics.

In summary, the assertion by the reinterpretation that a speaker's belief may be inferred from words he did not utter is illogical. The fact that the reinterpretation's conclusions as to the Senate ratification debate rely so heavily upon such statements reveals the flimsiness of its case.

The record of the Senate proceedings does not support Sofaer's assertion that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the ratification period "can be fairly read to support the so-called broader interpretation." On the contrary, the record of these proceedings makes a compelling case for the opposite conclusion: that the Senate was presented with a treaty that prohibited testing or development of mobile/space-based exotics; both the proponents and opponents of the treaty understood the agreement to have this effect; and there was no challenge to this understanding in the course of the Senate's approval of the treaty.

In summary, I have examined the reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible. I have concluded that the Nixon administration presented the Senate with the traditional interpretation of the treaty's limits on mobile/space-based exotics. I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the treaty. In my judgment, this conclusion is compelling beyond a reasonable doubt.

This finding at this juncture does not address all issues raised by the reinterpretation. In the two succeeding reports, I will examine the issues of subsequent practice and the negotiating record, and any final judgments must incorporate those assessments. Nonetheless, the findings that the Senate approved the ABM Treaty on the basis of its clear understanding, the acceptance of the traditional interpretation has serious ramifications for executive branch conduct. I would like to address these implications in closing my remarks.

Mr. President, in recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative; that is, the first part of the case is "the Senate was given the broad interpretation;" the second part of the case is, "just in case it was not given the broad interpretation here is the way we view it."

The State Department has argued that regardless of whether the ratification proceedings support the reinterpretation or broad interpretation, executive branch testimony presented to the Senate during the treaty-making process can be disregarded because it "has absolutely no standing" with the Soviets. In my opinion, this argument is incorrect in the context of the ABM Treaty, and is squarely in conflict with the constitutional role of the Senate.

Recent Soviet statements indicate that they now consider themselves bound by the traditional interpretation. For example, in an October 19, 1985, article in Pravda, Marshall Sergei Akhromeyev, the Chief of the Soviet General Staff, stated: "Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground basing, and, moreover, regardless of whether these systems are based on existing or 'future' technologies."

The Reagan administration has not argued that the Soviets do not now claim to be bound by the traditional interpretation. Rather, the administration's position—as stated by Judge Sofaer—is that, "Only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation."

Since the Soviets clearly agree with the traditional interpretation, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a rather curious, if not bizarre, argument. Let us look just for the purpose of discussion at the flip side of this interesting legal question. Let us assume for the purpose of this discussion that the Soviets were now taking the opposite position.

Let us assume that they were asserting now that U.S. statements during the ratification proceedings had "no standing" with them.

In other words, if hypothetically the Soviets took the position the State Department is taking, would the United States have any basis in international law for relying on the statements to the Senate if we were insisting that the Soviets comply with the traditional view?

As a matter of international law, the actions of the parties, including their statements, provide an important guide to the meaning of a treaty. As Lord McNair notes in his classic treatise, The Law of Treaties, "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of the treaty (sometimes called the 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion."

Furthermore, he goes on to state, quoting again "[w]hen one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practical to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute." This is similar to the proposition under U.S. domestic law, that "if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding." Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to interpreting the treaty and to the treaty's meaning.

In the case of the ABM Treaty, these principles taken on even greater significance in view of attendance by Soviet officials at the Senate hearings on the agreement. It is very interesting that Senators Goldwater and Jackson noted the presence of one such Soviet official—who was apparently a regular attendee—during an extensive discussion with Nixon administration officials during a July 19 Armed Services Committee hearing that dealt at length and in great detail with the specific question of the treaty's limitations in the area of laser ABM's, exactly the point we are debating now. Even if the presence of Soviet observers had not been noted for the record—which it was—it is obvious that the Soviets, who understand how our treaty-making process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter into the treaty and have the treaty go into force without raising an objection, the United States would have had a very strong basis in law for insisting on the original meaning as presented to the Senate—particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.

Aside from the immediate issue of the ABM Treaty, it is contrary to the long-term interests of the United States to assert that statements made to the Senate have no standing with other parties to a treaty. The international community is well aware of the constitutional role of the Senate in the treatymaking process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings. It is to our national advantage to ensure that such authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretative dispute among nations.

By asserting that the executive branch may now disregard the views of those who spoke for the Nixon administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that administration witnesses need not accurately reflect the executive's understanding of a treaty; instead, they are free to keep that understanding a secret and may indeed mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate. This line of argument has profound implications for the legislative process in general and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important role, however, in our constitutional system, and this should not be overlooked. Such statements are an integral part of the making of a treaty, often shaping its content, and well-known to all parties to the proposal.

Under article II, section 2, clause 2 of the United States Constitution, the Presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present. Article VI, paragraph 2 of our Constitution provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field, and I understand he is testifying before the Foreign Relations Committee today, has noted that "although treaty making has often been characterized as an executive function (in that special sense in which the conduct of foreign relations is executive), constitutional writers have considered the making of treaties to be different from other exercises of Presidential power, principally because of the Senate's role in the process, perhaps too because treaties have particular legal and political qualities and consequences."

Hamilton, in The Federalist (No. 75), clearly illustrated the intent of the Framers that treaty making be a shared power between Congress and the President, based on mutual trust.

Madison also took the position that "there are sufficient indications that the power of treaties is regarded by the Constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character."

The Senate has played a vital role in numerous treaty negotiations, through means such as the process of confirming negotiators, statutory requirements for congressional consultation during the negotiations process, and informal discussions. Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent—either expressly or through inaction—or approve it with conditions.

Because the Senate is an active participant in the making of the treaty, the hearings and debates are a vital source of information as to what the treaty means. The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions or forego conditions, if there is an authoritative statement as to the meaning of a provision.

The position of the State Department, I hope would be reexamined, because this position sends a clear message to the Senate: you cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the issues at hand regarding the ABM Treaty. Our treaty relationships involve not only arms control matters, but also trade and business matters affecting the economic well-being of our Nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

Because treaties are the supreme law of the land, the position of the State Department, if accepted by the executive branch, would compel the Senate to incorporate into its resolution of consent an "amendment" or "understanding" for every explanation given by an executive branch witness lest it be disavowed as "unilateral" after ratification. We would have to have so many understandings and conditions that the treaty would have to be negotiated all over again between the parties. Treaties so laden would eventually sink under their own weight. It would be extremely difficult to achieve bilateral agreements, and virtually impossible for the United States to participate in multilateral treaties. In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to ensure that no secret understandings would emerge contrary to assurances given to the Senate.

In short, in an effort to save the reinterpretation by asserting that executive branch statements to the Senate in 1972 are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the executive branch and Congress that would go far beyond this matter. It would be a mistake for the executive branch to compound the problem further by asserting that the Senate has no role to play with respect to the meaning of treaties.

As a general proposition, the views of the executive on the interpretation of a treaty normally receive great deference as well they should, from the Congress. Application of that principle in terms of the meaning presented to the Senate by the executive branch at the time of ratification leads to an interpretation that mobile/space-based exotics may not be developed or tested. Under the reinterpretation, such testing and development is permitted. In this situation, many in the Senate may be inclined to apply the classic line of cross-examination to the executive branch: "Should we believe what you are telling us now or should we believe what you were telling us back than?"

The Senate has the right to presume that executive branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treaty-making process. The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a treaty has the unfortunate effect of directly challenging the Senate's constitutional role. This effect could carry over and may well produce a congressional backlash through its exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the treaty as presented to the Senate.

In conclusion, Mr. President, the Senate was clearly informed by the executive branch that the ABM Treaty, prohibits testing and development of mobile/spaced-based ABM's using exotics. This was an issue which key Senators viewed as a matter of significance, and which was directly addressed by the executive branch during the treaty-making process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of the treaty. There are three distinct possibilities here.

First, if the negotiating record and evidence of subsequent practice by the parties supports the traditional interpretation, the issue would be beyond question. The traditional interpretation would apply. I will be looking at those two parts of this overall record in the next few days.

Second, if the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would

be no basis for abandoning the traditional interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the executive branch at the time of ratification in my view, should be upheld.

The third possibility, and perhaps the most disturbing possibility: If the negotiating record and evidence of the subsequent practices of the United States and Soviet Union establish a conclusive basis for the reinterpretation—in other words, if Judge Sofaer is right on the negotiating record—this would mean that the Nixon administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications—to say the least. In effect, the President would have to choose between the executive branch's obligations to the Senate and its contract with the Soviet Union. If the President did not choose to honor the commitments to the Senate, the Senate will then be faced with developing an appropriate response or risk having its role in the treaty-making process become meaningless.

In two reports which I intend to present to the Senate within a few days, I will address the subsequent practice of the two parties and the treaty negotiating record with a view toward determining which of the three situations now confront the Senate.

Mr. President, I ask that my complete record of this analysis be printed in the RECORD following this statement.

There being no objection, the report was ordered to be printed in the RECORD, as follows:

INTERPRETATION OF THE ABM TREATY

PART ONE: THE SENATE RATIFICATION PROCEEDINGS

(By Senator Sam Nunn, March 11, 1987)

PREAMBLE

For the past year and a half, the United States has been embroiled in a contentious and arcane internal dispute over the correct interpretation of those portions of the 1972 ABM Treaty which pertain to the development and testing of futuristic or so-called "exotic" ABM systems. This controversy was precipitated in October, 1985, when the Reagan Administration announced with no advance notice or congressional consultations that the interpretation of the Treaty which successive U.S. administrations had upheld since 1972 was incorrect.

The debate on the reinterpretation issue has necessarily been legalistic. Treaties are, after all, the law of the land, and the President is charged with executing the law. Moreover, the Senate has a crucial constitutional role in treaty-making and thus has a direct interest in ensuring that treaties are accurately presented and faithfully upheld. If the President can unilaterally change treaty obligations which were clearly understood and accepted by the Senate at the time it consented to ratification, it dramatically alters the Senate's constitutional role as a co-equal partner in this area.

For these reasons, it is imperative that the Administration's case for the reinterpretation be subjected to a rigorous legal analysis. Some have accused those who do not accept the Administration's case for the reinterpretation of allowing "legalisms" to stand in the way of necessary progress in the Strategic Defense Initiative. Others have accused the Administration—in one columnist's phrase—of "lookin' fer loopholes" in the Treaty through what might be called "sharp practices."

I believe that it is important to put aside accusations as to motive and judge the facts as they stand. If the reinterpretation is legally correct, then our Nation has every right to proceed accordingly. But if it is not legally correct, then manipulating the law of the land is not acceptable.

Before beginning this legal analysis, there are, however, a few points I want to make about the broader policy context within which this issue must be debated.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. The Treaty was accepted in 1972 by the Nixon Administration and the United States Senate on the assumption first, that the Soviet Union would strictly observe its terms, and second, that significant reductions in strategic offensive arms would be accomplished within five years.

Neither expectation has been fulfilled. The Soviets have not restrained the relentless expansion of their strategic offensive forces. Their massive investment in strategic defenses (primarily air defenses)—while not a violation of the ABM Treaty—does contradict the spirit of the agreement; that is, that both sides recognized and accepted that there can be no shield against retaliation. And violations such as the Krasnoyarsk radar undermine the integrity of the agreement.

In light of these considerations, the Soviet Union must recognize that the U.S. commitment to the ABM Treaty cannot be deemed unalterable or open-ended—whether or not the traditional interpretation of the Treaty is upheld. If arms control or unilateral strategic modernization efforts (such as moving to mobile ICBMs) fail to restore stability to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control and communications. Unless the ABM Treaty could be amended by mutual agreement to permit such deployments, this action would necessarily require the United States to exercise its right under the supreme national interest clause of the Treaty to withdraw on six months notice.

Certainly a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not counseling this course at this time. Nonetheless, the American public and our allies need to understand that if we cannot solve current strategic vulnerabilities through arms control or our own strategic programs, we may have no recourse but to consider deploying some form of strategic defense.

Second, those who support the reinterpretation in the name of accelerating the SDI may be laboring under a fundamental misimpression. There is a strong case that the specific SDI early deployment system now favored by Secretary Weinberger cannot be developed or tested under either interpretation.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements miss the point: there are other, more honorable responses available to the United States. These include, first, insisting that the Soviets correct the violations; second, proportional U.S. responses; and third and last, abrogation of the agreement.

For 200 years, the United States has stood for the rule of law as embodied in our Constitution. The reinterpretation issue must be approached not with an eye toward near-term gains, but rather with a decent respect for the long-term interests of the rule of law and the continued integrity of this Constitution—that magnificient document whose 200th birthday we celebrate this year.

SECTION I: INTRODUCTION

A. Background

In 1972, the United States and the Soviet Union entered into a Treaty on the Limitation of Anti-Ballistic Missile Systems.[1] During the Senate ratification proceedings, Secretary of State Rogers set forth the Nixon Administration's summary perspective on the Treaty: [2]

"Under this treaty, both sides make a commitment not to build a nationwide ABM defense. This is a general undertaking of utmost significance. Without a nationwide ABM defense, there can be no shield against retaliation. Both great nuclear powers have recognized, and in effect have agreed, to maintain mutual deterrence."

In broad outline, the Treaty prohibited deployment of all ABM systems except at two designated sites in each nation. At these sites, the ABM systems were limited to fixed, land-based components based on "then-current" technologies (i.e., ABM missiles, launchers, and radars). Research on these types of ABM components was not limited by the Treaty, but development and testing was confined to agreed test ranges.

The Treaty contained a further prohibition against development, testing, or deployment of sea-based, air-based, space-based, or mobile land-based ABM systems or components. In this report, these types of systems will be referred to collectively as "mobile/space-based" ABM systems. As with fixed, land-based ABM components, research was permitted on mobile/space-based ABM system. The distinction between fixed, land-based ABMs and mobile/space-based ABMs is a key aspect of the current Treaty reinterpretation controversy.

The Treaty has considerable current relevance because of its direct relationship to the Strategic Defense Initiative (SDI), initiated by President Reagan in 1983. A key element of SDI research involves the potential for a space-based ABM defense using futuristic technology, such as lasers or particle beams. Under current parlance, ABM components using "other physical principles" (i.e., physical principles or technologies "other" than those incorporated into ABMs in 1972) are known as "exotics" (and sometimes referred to as "future systems"). Another key issue in the current reinterpretation controversy involves the impact of the Treaty on development and testing of exotics.

The Reagan Administration initiated the SDI program under what is known as the "traditional" or "restrictive" interpretation of the ABM Treaty (hereinafter referred to as "the Traditional Interpretation"). Under the Traditional Interpretation, the Treaty has the following effect with respect to ABMs using "exotics" such as lasers:

TRADITIONAL INTERPRETATION OF THE TREATY

Research on all ABMs, including those urging exotic technologies, is permitted.

Testing and development of fixed, land-based exotics is permitted.

Testing and development of mobile/space-based exotics is prohibited.

Deployment of all exotics (whether fixed, land-based or mobile/space-based) is prohibited unless the parties agree to amend the Treaty.

The Reagan Administration developed an elaborate plan for a "treaty-compliant" SDI research program. This involved conducting SDI experiments and technology demonstrations in a manner which would not transgress the prohibitions under the Traditional Interpretation against the development of full-scale mobile/space-based ABM components or the testing of those components in an ABM mode.

B. Announcement of the reinterpretation

On October 6, 1985, Robert McFarlane, then the President's National Security Adviser, revealed that the Reagan administration was preparing to adopt a new interpretation of the Treaty, with dramatic implications for the conduct SDI. Appearing on *Meet The Press*, McFarlane announced that ". . . research involving new physical concepts . . . as well as testing, as well as development indeed, are approved and authorized by the treaty. Only deployment is foreclosed . . . ."

McFarlane's announcement of a new reading of the Treaty appeared to open the door to unrestricted development and testing of the actual components of a space-based SDI system utilizing exotic components. It was based on a preliminary legal opinion which had been written the preceding week by Abraham Sofaer, the State Department Legal Adviser.

The main lines of the reinterpretation argument (hereinafter referred to as "the Reinterpretation" or "the Sofaer analysis") may be summarized as follows: [3]

REINTERPRETATION OF THE TREATY

The text of the Treaty is ambiguous. It prohibits deployment of mobile/space-based ABMs using exotics. Although it is possible to read the Treaty as also banning testing and development of ABMs using exotics, Sofaer maintains that the Treaty "can more reasonably be read to support a broader interpretation"—i.e., that the Treaty permits such development and testing.[4]

The record of the Senate ratification debate and other statements at or near the time of ratification support an interpretation of the Treaty that would permit testing and development of mobile/space based ABMs using exotics. Sofaer contends that this record "can fairly be read to support the so-called broader interpretation."[5]

The classified negotiating record supports the Reinterpretation. Sofaer contends that the negotiating record demonstrates that "although the United States delegates initially sought to ban development and testing of non-land-based systems or components based on future technology, the Soviets refused to go along, and no such agreement was reached."[6]

McFarlane's announcement, based on the Sofaer analysis, provoked a sharply critical response by Members of Congress, former ABM negotiators, allied leaders, and the Soviet government. Widespread suspicion was voiced from these quarters that the Reinterpretation had been fabricated to advance SDI to the threshold of deployment without amending or abrogating the ABM Treaty.

Although the White House noted the President's agreement with McFarlane's statement, the President decided on October 11, 1985 that the SDI program would continue for the indefinite future to be conformed to the Traditional Interpretation. This decision was formally announced by Secretary Shultz at a meeting of NATO parliamentarians in San Francisco on October 14.

C. Conflicting Administration Views

From the outset, Administration officials provided conflicting views as to the likely duration of the policy of adhering to the Traditional Interpretation. In his October 14 statement, Secretary Shultz declared that switching to the broader interpretation was "a moot point," since the President had reaffirmed that the SDI program "will continue to be conducted in accordance with a restrictive interpretation of the Treaty's obligations." Nonetheless, the Secretary's statement also noted that this policy reflected the Administration's assumption that SDI would be "consistently funded at the levels required"—thereby suggesting that were Congress to cut SDI funding significantly, the policy might be reconsidered. However, on October 17, White House spokesman Edward Djerejian declared that congressional funding for SDI "is not a condition for U.S. treaty interpretation."

On October 21, Sofaer told the House Foreign Affairs Committee that the reinterpretation issue "may have practical significance only when the SDI program has reached the point at which questions regarding the feasibility of strategic defense have been answered and engineering development, with a view to deloyment, becomes a real option."[7] Sofaer apparently did not believe that this point would be reached at any time during the current administration. In response to a written question submitted by Senator Warner at a November 21 Armed Services Committee hearing, Sofaer commented on the possibility of legislation that would enact the Traditional Interpretation:[8]

". . . such legislation is unnecessary. The President has affirmed that he intends to pursue the SDI research program as currently structured, which is consistent with the 'restrictive' interpretation. Should a *future* Administration seek to implement the broader interpretation, the Congress would have a voice in that decision." (Emphasis added.)

Other Administration officials, however, continued to publicly advocate an early switch to the more permissive position. For example, at a December 5, 1985 Armed Services Committee hearing, Richard Perle said, "If you restrict the program to the restrictive interpretation, it would so prejudice the prospect for success that it would become questionable, in my view, whether we should continue with the program at all."[9] However, at the same hearing, the Director of the SDI, Lt. Gen. Abramson, testified that it would be "several years" before the Traditional Interpretation would impose any cost or time delay penalties on the program. General Abramson explained that by this, he meant "the early 1990 timeframe."[10]

When hearings on the interpretation of the Treaty failed to establish a consensus in the Congress in support of the Reinterpretation, the Senate sought direct access to the negotiating record so that an independent judgment could be made on the issue. The State Department initially refused to provide the record, but relented in August, 1986. Under an arrangement negotiated with Secretary Shultz, all Senators and six cleared staff members have had access to the negotiating record in Room S-407 of the Capitol, a secure facility under the direct control of the Majority and Minority Leaders.

The ABM Treaty interpretation issue is a matter of intense concern to me, both as a member of the Senate and as Chairman of the Armed Services Committee. This issue goes to the heart of the Senate's constitutional role in treaty-making. Furthermore, our Committee has jurisdiction over programs of the Department of Defense which are regulated under the Treaty, including SDI.

Over the last several months, I have devoted many hours to study of the Treaty, the ratification debate, and the negotiating record. I have been assisted in this review by Robert Bell, an arms control specialist on the staff of the Armed Services Committee. Mr. Bell has spent countless hours over the last several months researching these issues. In addition, I have been assisted in my legal analysis by Andrew Effron and Jeffrey Smith, who are both lawyers on the staff of the Armed Services Committee.

In recent weeks, the treaty reinterpretation issue has taken on a new sense of urgency. In the course of a February 3 National Security Council (NSC) meeting, Secretary Weinberger urged President Reagan to make immediate decisions on an early deployment of SDI, including authorizing the Defense Department to restructure SDI in accordance with the Reinterpretation.

D. Commitment to consultations

News reports of the February 3 discussion provoked deep concern in Congress and allied capitals. On February 6, I wrote the President expressing my concern that a decision to terminate the Administration's policy of observing the Traditional Interpretation without thorough consultations with Congress and our allies would provoke a profound constitutional confrontation. Faced with blunt warnings from allied leaders and other members of Congress, the Administration decided to postpone any imminent decision on this issue and to conduct additional research into such related issues as to what the Senate was told during the 1972 ratification proceedings and how the parties appeared to view the Treaty subsequent to its ratification.

On February 8, Secretary Shultz announced that prior to any final decisions, the Administration would engage in a "collaborative process" of consultations with Congress and our allies. At a February 24 meeting with Senate leaders, Ambassador Nitze and Assistant Secretary Perle provided further assurance that the new Administration studies (which were expected to be finished by the end of April) would be submitted to the Senate and Senators would be afforded an opportunity to review them and consult with the Administration before any final decisions were taken.

On March 9, I received a letter from Judge Sofaer in which he acknowledged that the analyses of the Senate ratification debate which he had previously submitted to the Senate did not cover the subject in full depth. He indicated that the new studies directed by the President would be thorough and comprehensive. I appreciate Judge Sofaer's candor and look forward to reviewing these studies when they are submitted to the Senate.

As a result of these developments, the Senate has both an opportunity and an obligation to make its views known on this issue in the course of the next several months. This report is intended to contribute to this process by examining the merits of the Reinterpretation. Sofaer's case for the Reinterpretation has been offered publicly in various places, including hearings before the Senate Armed Services Committee in 1985 and in the June, 1986 issue of the *Harvard Law Review*.[11]

The classified materials provided the Senate last August by the Department of State also include Sofaer's detailed analysis of the negotiating record, as well as brief re-

views of the Senate ratification proceedings and subsequent practice.

E. Definitions

To recap, the following definitions will be used for purposes of simplicity in this report:

1. *Fixed, land-based*: ABM systems or components which are immobile and are designed for a ground-based mode.

2. *Mobile/space-based*: ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

3. *Exotics*: ABM systems or components which are: (a) based on "other physcial principles" (i.e., physical principles other than those which were incorporated in ABMs at the time the Treaty was signed in 1972); and (b) capable of substituting for 1972-era ABM systems or components. (i.e., ABM missiles, launchers and radars).

4. *Then-current ABM systems or components*: ABM systems or components utilizing physical principles which were well known in 1972—i.e., ABM missiles, launchers, and radars.

5. *The Traditional Interpretation*: In its shortest form, the view that the development and testing of mobile/space-based exotics is prohibited under the Treaty.

6. *The Reinterpretation*: The view formulated by the current State Department Legal Adviser, Abraham Sofaer, which, in its shortest form, holds that the development and testing of mobile/space-based exotics is permitted under the Treaty.

F. Overview of report

Section II of this report summarizes the respective interpretations of the Treaty offered by the Traditional Interpretation and the Reinterpretation. Sections III and IV then examine the 1972 Senate hearings and debate on ratification of the ABM Treaty and the implications for current executive branch conduct of the Senate's understanding when it gave its advice and consent in 1972.

Within the next few days, I intend to release two additional reports which will address other important aspects of the reinterpretation issue. The first of these two reports will focus on the practice of the two parties after 1972 to determine whether this information sheds any useful light on their respective views of the meaning of the Treaty. The third and final report will state my conclusions with regard to the Treaty negotiating record. In the final report, I shall also revisit the Treaty text to read the document with the insight gained from the review of the Senate ratification debate, the parties' subsequent practice, and the negotiating record.

SECTION II: TWO DIFFERENT INTERPRETATIONS OF THE ABM TREATY

The Traditional Interpretation of the ABM Treaty is relatively straightforward: the Treaty expressly prohibits development and testing of mobile/space-based ABMs, and there is no exception for ABMs using exotics. The Reinterpretation is more complex, based upon the interrelationship of various articles in the text. This section summarizes the two theories.

A. The text of the treaty

The provisions of the 1972 ABM Treaty that bear on the question of exotic ABM systems and components include Articles II(1), III, IV, V(1), and Agreed Statement "D". The full text of the Treaty is set forth in Appendix 1.

ARTICLE II (1)

For purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

TRADITIONAL INTERPRETATION: Article II defines the term "ABM system" generically as a system which has the function of countering strategic ballistic missiles. The definition then lists, as an illustration, the components "currently" in use at the time of the agreement. Because the clause listing the components is only illustrative, it does not limit the term "ABM systems" to those containing such components. It also means that the term implicitly covers future systems. Consequently, future ABM systems that might use different components (i.e., exotics) are within the definition.

REINTERPRETATION: Article II is ambiguous, but it can be read more reasonably to limit the definition to those components current at the time of the agreement, thereby excluding ABMs using components other than interceptor missiles, launchers, or radars (e.g., excluding exotic components).

ARTICLE III

Each Party undertakes not to deploy ABM systems or their components except . . . [for two designated fixed, land-based systems with specific limitations on missiles, launchers, and radars].

TRADITIONAL INTERPRETATION: Article III bans deployment of all "ABM systems" or their components except those expressly authorized at two designated sites. By using the term "ABM systems," which is broadly defined in Article II under the traditional view, the prohibition on deployment in Article III extends to all present and future (i.e., exotic) ABM systems and components.

REINTERPRETATION: Applying a narrow definition of ABM systems under Article II, the Reinterpretation then reads the ban on deployment in Article III as applying only to the three then-current components. Under this view, Article III does not establish any barrier to the deployment of exotics.

ARTICLE IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

TRADITIONAL INTERPRETATION: Article IV limits all development and testing of fixed, land-based ABM systems or components to agreed test ranges. Using the traditional view's broad Article II definition of ABM systems, Article IV applies to exotics, as well as then-current, ABM systems, thereby restricting development and testing of exotics to the agreed test ranges. Since the Traditional Interpretation views Article V as banning the development or testing of mobile/space-based exotics (see discussion below), the only exotics which can be developed or tested are fixed, land-based exotics, and these can only be developed or tested at the agreed test ranges.

REINTERPRETATION: Applying a narrow definition of ABM systems under Article II, Article IV only concerns testing and development of then-current components. As a result, the development and testing of exotics (whether fixed, land-based or mobile/space-based) is not restricted to agreed test ranges, and exotics may be developed or tested anywhere.

ARTICLE V (1)

Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, or mobile land-based.

TRADITIONAL INTERPRETATION: Applying the Traditional Interpretation's broad Article II definition of ABM systems, Article V bans the development, testing, or deployment of all mobile/space-based "ABM systems," including exotics.

REINTERPRETATION: Consistent with the Reinterpretation's narrow reading of the definition of ABM systems, the prohibitions in Article V(1) apply only to ABM systems using "then-current" components. As a result, Article V does not prohibit the development, testing, or deployment of mobile/space-based exotics.

AGREED STATEMENT "D"

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII [the Standing Consultation Commission] and agreement in accordance with Article XIV of the Treaty [governing amendments].

TRADITIONAL INTERPRETATION: Agreed Statement D complements Article III (which bans deployment of all ABM systems, including exotics, except for fixed, land-based systems expressly permitted at the two specified deployment sites) and Article IV (which permits testing and development of fixed, land-based exotics at agreed test ranges. Agreed Statement D provides that if such testing and development leads either side to propose deployment of such exotics, the parties should negotiate the limitations which would govern such deployments. If, however, there is no agreement on appropriate amendments to the Treaty, the deployment of exotics remains prohibited.

REINTERPRETATION: Agreed Statement D is ambiguous. The Traditional Interpretation results in a reading of this provision that duplicates other parts of the Treaty (i.e., the ban on deployment of exotics in Article III and the procedure for discussing and agreeing upon amendments in Article XIII and XIV). To address the ambiguity and give independent meaning to this provision, it should be interpreted in light of the fact that it is the only part of the treaty that expressly mentions exotics. Therefore, Agreed Statement D should be read as banning deployment of all exotics (including fixed, land-based and mobile/space-based) unless the parties agree to amendments permitting such deployment. Moreover, because it only addresses deployment, it should be read as permitting testing and development of all exotics, including mobile/space-based as well as fixed, land-based.

B. Principles of treaty interpretation

International law has developed a series of principles for treaty interpretation, the best expression of which is the Vienna Convention on the Law of Treaties.[12] The U.S. has signed the Convention, but has not yet ratified it. The relevant articles are quoted below:

ARTICLE 31

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the *ordinary mean-*

ing to be given to the terms of the treaty in their *context and in the light of its object and purpose.* (Emphasis added.)

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;* (Emphasis added.)

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 codifies the customary international law principle that a treaty is to be interpreted as a whole and in "light of its object and purpose." Lord McNair, among the most respected scholars in this field, has written:[13]

"Closely connected with the primary duty of seeking to ascertain, and giving effect to, the common intention of the parties is the duty to bear in mind what may be called the overall aim and purpose of the treaty . . . Thus in the Advisory Opinion upon the Competence of the International Labour Organization to Regulate the Personal Work of Employers, the Permanent Court found no difficulty in holding that inability to make such regulations was 'clearly inconsistent with the aim and the . . . scope of Part XIII' [of the Treaty of Versailles], and that if any such limitation 'had been intended, it would have been expressed in the Treaty itself.' To the same principle may be related the duty to construe a treaty as a whole and not to focus attention upon any of its provisions in isolation. There is ample evidence of this practice."

Article 31 (b) also provides that the "subsequent practice in the application of the treaty . . . shall be taken into account in interpreting the treaty."

This is commonly known as the "practice of states" doctrine and is consistent with the customary international law that preceded the Vienna Convention. Lord McNair has written:[14]

". . . when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty . . . has a high probative value as the intention of the parties at the time of its conclusion. This is both good sense and good law."

Thus, the doctrine of the "practice of states" holds that courts will consider how the parties to the treaty have acted in implementing the agreement. The basic concept is simple, i.e. if there is some ambiguity in the meaning of a provision, but if the parties have conducted themselves consistent with a certain interpretation of that provision, then the courts will give great weight to that conduct as evidence of the meaning of the provision.

The current draft of the American Law Institute's Restatement of the Law is in accord both with respect to interpretation of text and the "practice of states" doctrine:[15]

Section 325. INTERPRETATION OF INTERNATIONAL AGREEMENTS:

(1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context an in the light of its objects and purpose.

(2) Any subsequent agreement between the parties regarding the interpretation of the agreement, or subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

In the accompanying comment, the ALI Reporters state that, although the United States has not ratified the Convention, this section "represents what states generally accept and the United States has also appeared willing to accept it."

With respect to recourse to the negotiating history, Article 32 of the Vienna Convention states,

"*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty* and the circumstances of its conclusion, *in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when* the interpretation according to article 31;

"(a) leaves the meaning ambiguous or obscure; or

"(b) *leads to a result which is manifestly absurd or unreasonable."* (Emphasis added.)

Thus, under the Vienna Convention, one does not look to the negotiating history unless the means of interpretation described in Article 31 prove inadequate or lead to a result which is manifestly absurd.

Despite this stricture, courts in the United States and the International Court of Justice have been more willing to review the negotiating record than is suggested by Article 32 of the Convention.[16] The United States Supreme Court, in *Nielsen* v. *Johnson,* said:[17]

"When [a treaty's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it."

The comment in the ALI Restatement states that "American courts are more willing than those of many other states to look outside the instrument to determine its meaning in the light of its purpose and the intent of the parties."[18] Thus under the approach taken by either the Vienna Convention or the U.S. courts, it is clear that resort may be had to the negotiating history if other steps fail to reveal the meaning of a particular provisions.

The Traditional Interpretation maintains that the Treaty text is clear on its face. To the extent that other sources of interpretation are consulted, the Traditional Interpretation maintains that they are consistent with the traditional reading of the treaty's text.

Because Sofaer concludes that the Treaty text is ambiguous, he contends that the negotiating record must be examined to determine the meaning of the Treaty. In this regard, the Reinterpretation holds that the negotiating record, which is classified, clearly supports the reinterpretation. The Reinterpretation also considers statements made to the Senate during its ratification proceedings, and concludes that they support the broader view. In other words, the Reinterpretation concludes that the Nixon Administration did not present the Traditional Interpretation to the Senate in 1972. Finally, the Reinterpretation considers U.S. and Soviet post-ratification statements between 1972–1985 and concludes that the record is mixed. The Reinterpretation however, disputes the view that successive U.S. administrations have consistently endorsed the Traditional Interpretation. As previously noted, I shall address each of these assertions in my three reports.

SECTION III: SENATE RATIFICATION PROCEEDINGS

A. Introduction

The ABM Treaty was signed by President Nixon and General Secretary Brezhnev on May 26, 1972. On the same day, the heads of the two negotiating delegations, Ambassadors Smith and Semenov, initialled a separate set of Agreed Statements. This included Agreed Statement D, which addressed the procedure for resolving issues that might arise regarding ABM systems and components using exotics.

Treaty ratification hearings before the Senate Armed Services Committee began on June 6, and the Senate Foreign Relations Committee commenced its proceedings on June 19. In addition, both the House Armed Services Committee and the House Foreign Relations Committee held hearings on the proposed agreements. The Senate, after a lengthy debate on August 3, gave its consent to ratification of the Treaty by a vote of 88–2.

The published records of all of these proceedings, as well as the classified transcripts of the Senate Armed Service Committee and the Foreign Relations Committee hearings, have been examined as part of this study. In view of the Senate's constitutional role in the treaty-making process, my examination focuses on the nine days of hearings held by the Senate Armed Services Committee, the six days of hearings conducted by the Senate Foreign Relations Committee, and the Senate floor debate. The period between May 26 and August 3 has been examined with a view towards identifying three categories of statements:

I. Those which explicitly support the reinterpretation.

II. Those which explicitly support the traditional view.

III. Those which generally address the subject of testing, development, or deployment of exotics but which do not explicitly support either interpretation.

B. Analysis of statements

The following sets forth the results of this review.

I. *The Analysis of the Reinterpretation has not identified a single statement in the record of the ratification proceedings which explicitly supports its case.*

The Sofaer analysis has not identified, nor did I find, any statements in the record in which any Senator or any Nixon Administration official explicitly stated that development and testing of mobile/space-based exotics was permitted.

II. *The record contains a series of authoritative statements explicitly supporting the traditional view that the treaty prohibits testing and development of mobile/space-based exotics.*

In a series of statements, including authoritative written statements submitted for the record, key administration officials and Senators made it clear that the Treaty's prohibition on testing and development of mobile/space-based ABM systems or components applied to exotics.

a. *At the first hearing, the Executive Branch set forth the Traditional Interpretation of the Treaty, expressly discussing the difference between fixed, land-based ABMs and mobile/space-based ABMs in the context of exotics.*

The question of exotics was raised in the first Senate hearing that considered the Treaty. Senator Goldwater, in a question for the record to Secretary of Defense Laird, noted that he had "long favored" moving ahead with space-based ABMs capable of conducting boost-phase intercepts using "shot, nuces (sic.), or *lasers*," and asked whether it was correct that nothing in the Treaty "prevents development to proceed in that direction."[19]

The written reply from DOD distinguishes between development of fixed, land-based ABMs (which is permitted by the Treaty) and development of mobile/space-based ABMs (which is prohibited). The reply expressly related these provisions to lasers, an "exotic" ABM component:[20]

REPLY OF SECRETARY LAIRD TO QUESTION FROM SENATOR GOLDWATER

"With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems. There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components. There are no restrictions on the development of *lasers* for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with Article XIII (Standing Consultative Commission) and agreement in accordance with article XIV (amendments to the treaty)." (Emphasis added.)

This statement is particularly significant because it embodies a formal, written Executive Branch response. It clearly sets forth the Traditional Interpretation of the Treaty with respect to exotics, permitting development and testing only in a fixed, land-based mode. The reply makes it clear that mobile/space-based exotics are subject to the comprehensive ban on development, testing, and deployment, with the understanding—as stated in Secretary Laird's reply—that the treaty only permits "basic and advanced research and exploratory development."

It is also noteworthy that the reply clearly links the ban on development of mobile/spaced-based ABM laser systems to Article V of the Treaty. Article V contains a comprehensive ban on mobile/space-based, ABM systems. Secretary Laird's express linkage between mobile/space based exotics and Article V directly refutes the Reinterpretation's analysis of the Treaty's text, which asserts that Article V applies only to components existing in 1972 (i.e., missiles, launchers, and radars).

The detailed Executive Branch reply was omitted from an October 30, 1985 analysis of the ratification debate submitted to the Senate Armed Services Committee by Sofaer on November 21, 1985.[21] This omission was brought to the attention of the Committee on January 6, 1986 in a letter from John Rhinelander, the legal adviser to the U.S. SALT I Delegation. In a subsequent analysis of the ratification debate published in the June 1986 *Harvard Law Review*, Sofaer conceded in a footnote that the DOD reply to Goldwater supports the Traditional Interpretation.[22]

b. *An exchange between Senator Henry Jackson and DOD's Director of Research and Engineering confirmed the Treaty's ban on testing and development of mobile/spaced-based exotics.*

During the Senate debate on the SALT I accords, which included the ABM treaty, the late Senator Henry Jackson, a senior Member of the Armed Services Committee, conducted a rigorous inquiry into the agreements, with a profound impact on the conditions of Senate acceptance. From the outset, he exhibited a keen sensitivity to the issue of exotics by focussing on laser ABMs. For example, just five days after the Treaty's signing, he made a statement sharply critical of the Army's reputed cancellation of a research involving laser ABSs.[23]

When Secretary Laird came before the Committee on June 6, he quickly assured Senator Jackson that no such contract has been cancelled. When Senator Jackson asked about ABM Treaty limits in this area, Secretary Laird gave a general reply—noting only that "research and development can continue, but certain components and systems are not to be developer"—without getting into the distinction between fixed, land-based systems and mobile/space-based systems.[24]

Senator Jackson pursued that distinction in a June 22 hearing during testimony by Dr. John Foster, Director of Defense Research and Engineering, and Lt. Gen. Walter Leber, the Program Manager of the Army's Safeguard ABM system. This hearing involved a careful discussion of Treaty's limits regarding development of ABMs using exotics, with a specific focus on the distinction between fixed, land-based systems and mobile-space based systems.

Senator Jackson began by noting that there were limitations in the Treaty on lasers and then asked whether the agreement prohibited "*land-based* laser development?" (Emphasis added.)[25]

Dr. Foster replied, "No sir; it does not." The text of the printed hearing reads as follows:

LASER ABM SYSTEM

Senator JACKSON. Article V says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based, space based or mobile land based.

Dr. FOSTER. Yes sir, I understand. We do not have a program to develop a laser ABM system.

Senator JACKSON. If it is sea based, air based, spaced based or mobile land based. If it is a fixed, land-based AMB system, it is permitted; am I not correct?

Dr. FOSTER. That is right.

Senator JACKSON. What does this do to our research—I will read it to you: section 1 of article 5—this is the treaty: "each party undertakes not to develop"—it hits all of these things—"not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".

Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an AMB radar, ABM launcher, or ABM interceptor missile.

Senator JACKSON. You can't even test; you can't develop.

Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based. My understanding is that you can develop and test but you cannot deploy. You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

When Senator Jackson suggested that even research on ABM lasers might be prohibited, Dr. Foster said, "No." Interposed between Senator Jackson's question and Dr. Foster's answer is the following insert for the record:[26]

"Article V prohibits the development and testing of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based. Constraints imposed by the phrase 'development and testing' would be applicable only to that portion of the 'advanced development stage' *following laboratory testing*, i.e., that stage which is verifiable by national means. Therefore, a prohibition on development—the Russian word is 'creation'—would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or breadboard model."

The importance of this submission as an authoritative statement of Nixon Administration policy is underscored by the original transcript of this hearing (currently maintained in the Armed Services Committee archives), which reveals two key points. First, Dr. Foster pledged to submit the insert after Senator Jackson had declared that "We had better find out" exactly how the Treaty applied to research and development in this area. Second, the transcript reveals that Dr. Foster declared that in order to clarify this issue, *the submission would reflect a detailed review of the negotiating record.*

The unedited exchange reads as follows:[27]

Dr. FOSTER. I think you can engage in research or development of laser *land based* ABM systems; you cannot deploy them as a kill mechanism against ICBMs. (Emphasis added.)

Senator JACKSON. Well, that is something we had better find out about it. I would [sic.] you would—

Dr. FOSTER. I would be glad to go through the record, Senator Jackson, in some detail and try to clarify this.

As is the normal practice in editing congressional hearings, the comments about what was to be submitted for the record was deleted and replaced by the actual submission.

Several observations about the extensive exchange between Senator Jackson and Dr. Foster deserve emphasis. First, it includes a formal, written submission, which provided the Executive Branch with an opportunity to prepare an official coordinated statement after review of the negotiating record. As such, it clearly represents an authoritative statement of the Administration's position. Second, the fact that the statement refers to Article V (the Treaty's ban on testing, development, and deployment of mobile/space-based ABMs) in the context of lasers (an "exotic" component) again refutes the Reinterpretation's premise that Article V does not apply to ABMs using exotics.

The Jackson-Foster exchange directly contradicts the Reinterpretation of the Treaty. The credibility of the Sofaer analysis if further undermined by the distorted manner in which it treats this crucial dialogue between a leading Senator and high-level Nixon Administration witness. For example:

(1) The version of this extensive Jackson-Foster exchange presented in Sofaer's October, 1985 analysis of the ratification proceedings and in Sofaer's June, 1986 *Harvard Law Review* article advocating the reinterpretation is greatly abbreviated. While the Reinterpretation acknowledges that Dr. Foster's comments support the Traditional Interpretation, the only portion of the entire exchange which it cites is the following:[28]

Dr. FOSTER. One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile. . . . You can develop and test up to the development phase of future ABM system components which are fixed and land based.

Foster's explicit confirmation that development and testing of space-based, or mobile land-based laser ABMs was prohibited is omitted in the Reinterpretation. There is also no mention in the Reinterpretation of Foster's written submission nor its linking the discussion of limits of laser ABMs to Article V.

(2) Dr. Foster, a Presidential appointee, was the highest ranking technical official, and third-ranking civilian in the Defense Department. He had served in his position since 1965. Nonetheless, the Sofaer analysis tries to disparage his testimony by stating Foster was "not involved in the drafting or negotiation of the Treaty." [29] The suggestion that the Director of Defense Research and Engineering would not have acquainted himself thoroughly with the Treaty's effect on programs under his supervision prior to representing the Administration before the Armed Services Committee is absurd. At any rate, as discussed above, the transcript confirms that Dr. Foster's written submission was based on a detailed review of the negotiating record.

(3) Sofaer's account of the exchange excises Senator Jackson's half of this dialogue in its entirety. As a result, anyone reading this analysis would not know that Senator Jackson had acquired a detailed understanding of the treaty limits in this area or, indeed, that the Senator took the lead in drawing out of the witness explicit confirmation of these restrictions.

(4) As a result of this omission, the *only* mention of Senator Jackson in Sofaer's October, 1985 analysis of all of the Armed Services Committee's ratification hearings is in a discussion of a hearing on July 19, which will be considered below. In a summary comment on Senator Jackson's July 19 statements, the Reinterpretation concludes: "Fairly read, Senator Jackson's comments do not address future systems." [30] By omitting the extensive June 22 Jackson/Foster exchange on laser ABMs (as well as other instances when Senator Jackson querried witnesses on the question of laser ABMs, including a highly classified session on June 26 with CIA Director Richard Helms), the Reinterpretation is then able to claim in a paragraph summarizing *all congressional hearings during the ratification proceedings* that "Senator Jackson's comments do not appear to address future systems." [31] Sofaer's assertion that Senator Jackson *never* addressed the question of limits on laser ABMs during the entire Senate debate on the ABM Treaty is flatly contradicted by the record of the debate.

c. *In a July 19 exchange with Senator Jackson, General Palmer confirmed that the JCS supported the limitation under which testing and development of exotics was restricted to fixed, land-based systems.*

The record of the July 19 hearing before the Armed Services Committee not only repudiates the claim that Senator Jackson did not address future systems, it also contains a crucial passage confirming the Joint Chiefs' understanding of the difference between fixed, land-based and mobile/space-based exotics in terms of the restrictions on development and testing.

This hearing involved an extensive exploration of Treaty's limits on exotics, focusing on laser ABMs. The key exchange occurred between three Senators (Goldwater, Jackson and Dominick), and three Executive Branch witnesses (General Ryan, Chief of Staff of the Air Force, General Palmer, Acting Chief of Staff of the Army, and Lt. Gen. Leber, Project Manager of the Safeguard ABM Program.) This exchange covers seven pages of the printed hearing. During this exchange, the word "laser" was used thirteen times, descriptions of or references to lasers were made six other times, and the phrase "futuristic systems" was mentioned three times.

The following discussion, which was initiated by a question from Senator Goldwater as to whether the deployment of laser ABMs was banned, is representative of the dynamic, back-and-forth character of this discussion: [32]

General LEBER * * * The only restriction is that you would not substitute a laser device for one of the components of your ABM system.

Senator JACKSON. Would the Senator yield right there?

Senator GOLDWATER. Yes, sir.

Senator JACKSON. Can you tell us how that is going to be monitored?

General LEBER. This would be monitored through the commission General Palmer has mentioned, the Joint Commission . . .

Senator JACKSON. Without some sort of onsite inspection, we can't monitor "development," can we?

General LEBER. I think we can detect testing of laser devices in an ABM mode; I think we can without onsite inspection.

Senator JACKSON. Testing, yes; but development, how are you going to monitor that?

From this colloquy, it is evident that Senator Jackson was concerned about the verifiability of the Treaty limits on the *development and testing of laser ABMs*, and he demonstrated his mastery of the details in this area by ensuring that the Committee obtained clarifying details from the witnesses. The following exchange, also on the subject of the verifiability of limits on the development and testing of *laser ABMs*, is illustrative of Senator Jackson's leading role in making it clear that only fixed, land-based exotics were exempt from the prohibition against testing and development: [33]

Senator DOMINICK. There isn't any ban, as I understand it, on research and development on either side.

General RYAN. That's right.

Senator DOMINICK. So, therefore, the onsite inspection is no different; the offsite inspection is no different now than it was before?

Senator JACKSON. Yes, but under Article V of the ABM Treaty "Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based."

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-based ABM is exempt.

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-baseve [sic].

Senator GOLDWATER. We could then replace the Sentry with the *laser* if it became effective? (Emphasis added.)

Senator JACKSON. The prohibition runs to sea based, air based, space based, or mobile land based ABMs.

Senator GOLDWATER. Not fixed land?

Senator JACKSON. That's right. That is exempt. I am just pointing this out. In those other areas, it is prohibited and, *development is also prohibited*, (Emphasis added.)

This exchange directly refutes the Reinterpretation by demonstrating the understanding of these key Senators as to the difference between permissible testing and development of fixed, land-based exotics and prohibited testing and development of mobile/space-based exotics.

During the same hearing, Senator Jackson also questioned the witness about General Palmer's broad statement that the treaty "does not limit R&D on futuristic systems." [34] Senator Jackson, expressing concern about the generality of this response, drew the witnesses' attention to Article V's prohibition on development of mobile ABM systems. General Ryan noted the distinction between permissible development of fixed, land-based systems and the prohibited development of mobile/space-based systems. Finally, General Palmer provided an authoritative statement on the prohibition on development of mobile/space-based exotics:

General PALMER. I would like to come back to the question.

Senator JACKSON. You are here in a professional capacity and we need your professional judgment.

General PALMER. On the question of the ABM, the facts are that when the negotiation started the only system actually under development, in any meaningful sense, was a fixed, land-based system. As the negotiations progressed and the position of each side became clear and each understood the other's objectives better, it came down to the point where to have agreement it appeared that—this is on the anti-ballistic missile side—*this had to be confined to the fixed, land-based system.* The Chiefs were consulted. I would have to go to a closed session to state precisely the place and time. They were consulted on the question of qualitative limits on the AB (sic) side and agreed to the limits that you see in this treaty.

Senator JACKSON. *Even though it cannot be monitored?*

General PALMER. Yes.

Senator JACKSON. I just wanted that; so the Chiefs went along with the concept here that involved——

General PALMER. A concept that does not prohibit the development in the fixed, land-based ABM system. *We can look at futuristic systems as long as they are fixed and land based.*

Senator JACKSON. I understand.

General PALMER. *The Chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement.* (emphasis added.) [35]

Sofaer's analysis of this discussion omits Palmer's crucial closing comment that the JCS were aware of the limits on development and testing of laser ABMs, had agreed to them, and recognized that this was "a fundamental part of the final agreement." Thus, the record demonstrates that Sofaer's assertion that Senator Jackson did not address the question of exotics during the ratification debate is a complete and total misrepresentation. It also underscores the inadequacy of its analysis by its omission of this additional, and authoritative, confirmation that the Treaty banned the development and testing of all but fixed, land-based exotics.

It is also noteworthy that Senator Jackson and the Executive Branch witnesses clearly cited the prohibition on testing and development of mobile/space-based systems in Article V of the treaty as the authority for the prohibition on testing and development of missile/space based ABM using exotics. This further undermines the Reinterpretation's analysis of the Treaty's text in which it asserts that Article V should not be read as applying to mobile/space-based exotics.

d. *Opposition to the treaty was based on the prohibition against testing and development of mobile exotics—a limitation commonly understood by both proponents and opponents of the treaty.*

On June 29, Senator James Buckley testified before the Foreign Relations Commit-

tee. By that time, he had emerged as a vocal critic of the ABM Treaty and was later one of only two Senators who voted against it. During his testimony, Senator Buckley was questioned by Senator Fulbright, Chairman of the committee, Senator Sparkman, who managed the Treaty debate on the Senate floor, and Senator Cooper, who had played one of the leading roles in the ABM deployment debate in the late 1960s.

Senator Buckley opposed the Treaty primarily because it prohibited the development, testing, and deployment of space-based ABMs using exotics:[35]

Thus the agreement goes as far as to prohibit the development, test or deployment of sea, air or space-based ballistic missile defense systems. *This clause, in Article V of the ABM Treaty, would have the effect, for example of prohibiting the development and testing of a laser-type system based in space* which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement. There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable techniques for the defense of civilians against ballistic missile attack? (emphasis added.)

In response to a question by Senator Sparkman, Senator Buckley made it clear that he was opposed to the Treaty not because it prohibited an ABM defense using *then-current* systems, but rather because it prohibited the development of *new* space-based ABM systems:[37]

Senator SPARKMAN. Senator Buckley, I think you make your position clear. Now, as I understand it, you do not agree with the President in his viewpoint on this, nor the Joint Chiefs of Staff?

Senator BUCKLEY. * * * Where I am in disagreement * * * is the philosophy of a mutual deterrence * * * Now on the basis of existing technology, I can see the reasoning for this, although there is a question about the effectiveness of available ABM technology; but I do question the morality of deciding now for all time that we will preclude ourselves from developing new concepts which at a later date could mean that the city of Washington or New York or San Francisco or Detroit could not be meaningful protected * * *.

The record of the hearing indicates that these three senior members of the committee of principal jurisdiction over the Treaty well-understood the basis for Senator Buckley's opposition. Indeed, Senator Cooper, while not agreeing with Senator Buckley's opposition to the Treaty, praised the witness for his testimony, saying: [38]

I would like to say I think that Senator Buckley has performed a useful service here today. You have raised practically every question I think that might have been considered by the negotiators. Your paper shows the very thorough knowledge you have of the negotiations and of the systems. Your questions are very valuable because the questions you raised, in their technical application at least, are correct.

On August 3, during debate on the treaty on the floor of the Senate, Senator Buckley repeated the main themes he voiced during his appearance before the Foreign Relations Committee, including the following principal criticism of the treaty: [39]

"Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space based ballistic missile defenses. This clause, in Article V of the ABM treaty, would have the effect, for example, of prohibiting the development and testing of a laser type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. This technological possibility has been formally excluded by this agreement."

Senator Buckley's testimony before the Senate Foreign Relations Committee clearly confirms the meaning of the treaty as presented to the Senate by the Executive Branch. Despite the clear, unrebutted impact of this testimony, it is omitted completely from Sofaer's October, 1985 analysis and his 1986 *Harvard Law Review* article. Sofaer cities Buckley's floor speech, but denigrates its significance by raising "the possibility that opponents of the treaty may have tries to exaggerate its limitations."[40] In view of the consistency between Buckley's statement and the Executive Branch's presentation of the treaty, this assertion is without merit.

The Senate's understanding of the treaty is underscored in the following remarks by Senator Thurmond, delivered on the floor of the Senate just prior to the vote on the treaty:[41]

Under the treaty, we also give up the right to deploy any *land-based systems of a new type*. At the same time we undertake 'not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based'." (Emphasis added.)

The Reinterpretation acknowledges that "Thurmond's comment could be read to indicate development of future systems, other than land-based, was prohibited."[42]

III. *The record contains various general statements on the development, testing or deployment of exotics, without reference to their basing mode. Because these statements do not distinguish between fixed, land-based systems and mobile/space-based systems, they carry little probative value either way with respect to the correct interpretation.*

The record of the ratification proceedings contains a number of other statements which touched on the subject of exotics. Most of these involved a general statement by a Senator or an administration official to the effect that under the Treaty, future ABM systems based on other physical principles could not be deployed. Other statements involved general remarks that "R&D" on lasers was permitted, but without any specifity as to basing mode (i.e. whether fixed, land-based or mobile/space-based).

As previously noted, the reinterpretation does not cite a single statement in the record of the Senate ratification proceedings in which a Senator or Executive Branch official *explicitly* states that development and testing of mobile/space-based exotics is permitted under the Treaty. Consequently, the reinterpretation's claim that this record can be read to support the reinterpretation rests on statements which it *infers* as supportive of this view. All of these statements fall into one or the other of the two following categories.

a. *General Statements Concerning the Ban on Deployment*

In the Reinterpretation, much is made of brief statements to the effect that the deployment of exotics is banned. For example, during his May 26, 1972 press conference, Ambassador Smith said, "future systems * * * will not be deployable unless this treaty is amended." [43] The Reinterpretation reads this statement as supportive of its case, arguing that "It is unlikely that Ambassador Smith, the negotiator of the Treaty, would have referred to only a ban on deployment if he had meant testing and development were banned as well." [44]

Smith's statement that the deployment of exotics is banned is, however, fully consistent with the Traditional Interpretation. Nonetheless, the Reinterpretation suggests that since Smith cited the ban on deployment of exotics but omitted any mention of a ban on their development or testing, then he must have believed that the Treaty gave a "green light" to such activities; that is, that he would have gone on to say, had he voiced his opinion on this issue, that the Treaty *permits* the development and deployment of all exotics.

In short, the Reinterpretation presumes that if Smith had believed that the Traditional Interpretation had been agreed to he would not have said simply that "future systems * * * will not be deployable unless this treaty is amended"—he would have said that "future systems will not be developed, tested, or deployed unless this treaty is amended."

There are three major problems with the logic upon which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of future systems (i.e., exotics) is banned. Second, it attempts to build a major case on what was *not said*. Third, if Smith had said what the Reinterpretation postulates he should have said, he would have been *wrong*. Why? Because under both the Traditional Interpretation and the Reinterpretation, the development and testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the Traditional Interpretation.

Under the logic of the Reinterpretation, to prevent his remarks from being distorted in the future and, at the same time, ensure accuracy, Smith would have had been compelled to turn his brief sentence into something resembling the following:

"Future systems (i.e., exotics)—whether fixed, land-based or mobile/space-based—will not be deployable unless the treaty is amended. Future fixed, land-based exotics may be developed and tested, but only at the agreed test ranges as established under Article IV. Future mobile/space-based exotics may not be developed or tested at all in accordance with Article V."

In summary, the assertion by the Reinterpretation that a speaker's belief may be inferred from words he did not utter is illogical. The fact that the Reinterpretation's conclusions as to the Senate ratification debate rely so heavily upon such statements reveals the flimsiness of its case.

In addition to Smith's May 26 statements, the following statements fall into the category of general remarks concerning the ban on deployment:

(1) A section in Secretary of State Rogers' June 10 letter of transmittal, subheaded "Future ABM Systems", which included the following sentences: [45]

"A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The Treaty would not permit the deployment of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers or radars."

The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based

exotics. Neither did Rogers say that the development and testing of exotics are permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(2) Two statements by Secretary Rogers to the Foreign Relations Committee on June 19 which indicated that future "exotic" types of ABMs, such as lasers, could not be deployed.[46] The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Rogers say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(3) A similar comment by Ambassador Smith at the same hearing.[47] The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(4) A June 28 prepared statement by Ambassador Smith during an Armed Services Committee hearing that no exotics could be deployed unless the treaty was amended.[48] The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

b. *General statements concerning research and development of exotics.*

The Reinterpretation also points to a number of statements in which a witness or Senator states that lasers could be developed under the Treaty—without differentiating between fixed, land-based and mobile/space-based systems. Under both interpretations, such statements are correct as applied to fixed, land-based laser ABMs. In addressing these statements, it is important to recognize that at the time of the 1972 ratification debate, the *only* U.S. R&D program of any significance in the area of laser ABMs was a fixed, land-based system. As previously noted, the Nixon administration had been stung by Senator Jackson's charge in early June that an Army laser ABM contract had been cancelled due to the Treaty. Thus, it is not surprising that executive branch officials would have sought to assure the Senate by making broad statements that R&D on laser ABMs could continue.

The following statements—all of which are cited by the Reinterpretation in support of its case—fall into this category:

(1) A June 20 reply by Secretary Laird to a question by Senator Thurmond: [49]

Senator THURMOND. I understand we have had R&D programs, such as the development of the laser-type ABM system. Is there a good reason why we should forever preclude the possibility of developing a truly effective defense of our cities if our technology should make one available?

Secretary LAIRD. * * * The Treaty, of course, does make such deployments contingent upon treaty amendment, but it does permit research and development on the ongoing technology which we have in these fields.

(2) A June 22 exchange between Dr. Foster and Senator Smith: [50]

Senator SMITH. In other words, the laser, if it was developed to the ultimate, could not be used at one of the two sites.

Dr. FOSTER. Yes, its deployment would be prohibited by the Treaty * * *.

Senator SMITH. But that will not slow us up or slow us down on continued research and development of the laser, will it?

Dr. FOSTER. No, Senator, it will not.

(3) A statement by Ambassador Smith to Senator Smith at the same hearing that development but not deployment of ABM systems based on "different physicial principles" was permitted. This statement made no mention of whether this was affected by the basing mode.[51]

(4) A statement by Ambassador Smith to Senator Goldwater at the same hearing that neither side would be precluded from the development of the laser as an ABM.[52]

(5) A statement by Senator Fong during his August 3 floor speech which noted generally that research and development of "exotics" could be continued.[53]

Conclusions

The record clearly demonstrates that the key figures in the Senate debate—Senators Jackson, Buckley, Goldwater, Thurmond, Cooper and Sparkman—understood that the development, testing and deployment of space-based "exotics" was not permitted under the treaty.

Moreover, there was clearly a perception within the Senate that the ratification hearings had served a crucial function in clarifying the Treaty's terms. Senator Jackson commented on this during his final speech on the Treaty just prior to the vote. After noting the extensive hearings in the Armed Services Committee and the "literally hundreds" of questions he has asked, Senator Jackson said: [54]

"Several things emerged from this effort, not least of all some important clarification by administration spokesman of various provisions of the agreements. Some of these provisions had been interpreted in several different ways depending on the witness commenting upon them. I believe the hearings were helpful both in clarifying the obligations we have undertaken and in understanding the implications for our future security of the many limitations to which we and the Soviets have agreed. Many Senators will recall the early confusion that surrounded the first announcements of the agreements. I hope that as we begin our consideration of the agreements the terms of them are at last firmly in mind."

In this regard, it is noteworthy that with the exception of Senator Fong's floor statement, all of the general statements on deployment and R&D occurred early in the ratification proceedings (i.e., in June), well before the extensive exploration of Treaty limits on lasers which took place during the July 19 Armed Services Committee hearing (and before Senator Buckley's June 29 testimony before the Foreign Relations Committee).

Finally, the prohibition on testing and development of exotics was squarely presented to the Senate by the Executive Branch, and that policy choice (but not the treaty interpretation) was vigorously challenged by Senator Buckley. *At no point during the proceedings did any Executive Branch witness or Senator say "no, that interpretation is wrong, the treaty does not prohibit such testing."* Indeed, during the pointed discussions of exotics involving the distinction between fixed, land-based ABMs and mobile ABMs, not one witness or Senator ever stated that deployment and testing of mobile/space-based exotics was permitted.

The record of the ratification proceedings supports the following conclusions about the scope of the Treaty.

Executive Branch witnesses clearly stated that development and testing of mobile/space-based exotics was banned, while development and testing of fixed, land-based exotics was permitted.

Key members of the Senate (including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley) were directly involved in the dialogue and debate concerning the implications of the treaty, which the record indicates they clearly understood to ban testing and development of mobile/space-based exotics.

The Reinterpretation is based on two categories of incomplete, imprecise, or general statements: those which indicate that exotics cannot be deployed and those which indicate that R&D on lasers is permitted. However, each of these statements can be read as consistent with either the Traditional Interpretation or the Reinterpretation. Furthermore, all but one of these occurred early in the proceedings before clarifications were brought out in the course of detailed questioning in the Armed Services Committee.

The record of the Senate proceedings does not support Sofaer's assertion that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the the ratification period "can be fairly read to support the so-called broader interpretation." [55] On the contrary, the record of these proceedings makes a compelling case for the opposite conclusion: that the Senate was presented with a treaty that prohibited testing or development of mobile/space-based exotics; both the proponents and opponents of the treaty understood the agreement to have this effect; and there was no challenge to this understanding in the course of the Senate's approval of the treaty.

In summary, I have examined the Reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible. I have concluded that the Nixon Administration presented the Senate with the Traditional Interpretation of the Treaty's limits on mobile/space-based exotics. I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the Treaty. In my judgment, this

conclusion is compelling beyond a reasonable doubt.

This finding does not address all issues raised by the Reinterpretation. In the two succeeding reports, I will examine the issues of subsequent practice and the negotiating record, and any final judgments must incorporate those assessments. Nonetheless, the finding that the Senate approved the ABM Treaty on the basis of its clear understanding and acceptance of the traditional interpretation has serious ramifications for executive branch conduct. These implications will be addressed in the following section.

SECTION IV: IMPLICATIONS FOR EXECUTIVE BRANCH CONDUCT

A. The novel attempt to dismiss the significance of statements during ratification proceedings ignores basic principles of treaty interpretation.

In recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative. State has argued that regardless of whether the ratification proceedings support the the Reinterpretation, Executive Branch testimony presented to the Senate during the treaty-making process can be disregarded because it "has absolutely no standing" with the Soviets. In my opinion, this argument is incorrect in the context of the ABM Treaty, and is squarely in conflict with the constitutional role of the Senate.

Recent Soviet statements indicate that they now consider themselves bound by the Traditional Interpretation. For example, in an October 19, 1985 article in *Pravda*, Marshall Sergei Akhromeyev, the Chief of the Soviet General Staff, stated: "Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground basing, and, moreover, regardless of whether these systems are based on existing or 'future' technologies." [56] The Reagan Administration has not argued that the Soviets do not *now* claim to be bound by the Traditional Interpretation. Rather, the administration's position—as stated by Sofaer—is that "only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation.[57]

Since the Soviets clearly agree with the traditional interpretation, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a curious argument. Let us assume, however, that the Soviets were now asserting that U.S. statements during the ratification proceedings had "no standing" with them. Would the U.S. have any basis in international law for relying on the statements to the Senate if we were insisting that the Soviets comply with the traditional view?

As a matter of international law, the actions of the parties, including their statements, provides an important guide to the meaning of a Treaty. As Lord McNair notes in his classic treatise, The Law of Treaties,[58] "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of the treaty (sometimes called the 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusions."[58]

McNair also states that "when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal." [59] Furthermore, "[w]hen one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practical to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute." [60] This is similar to the proposition under U.S. domestic law, that "if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding." [61] Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to the treaty's meaning.[62]

In the case of the ABM Treaty, these principles take on even greater significance in view of attendance by Soviet officials at the Senate hearings on the agreement. Indeed, Senators Goldwater and Jackson noted the presence of one such Soviet official—who was apparently a regular attendee—during an extensive discussion with Nixon Administration officials during a July 19 Armed Services Committee hearing that dealt at length and in great detail with the specific question of the Treaty's limitations in the area of laser ABMs.[63] Even if the presence of Soviet observers had not been noted for the record—which it was—it is obvious that the Soviets, who understand how our treaty-making process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter the Treaty into force without raising an objection, the U.S. would have had a very strong basis in law for insisiting on the original meaning as presented to the Senate—particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.

Aside from the immediate issue of the ABM Treaty, it is contrary to the long-term interests of the United States to assert that statements made to the Senate have no standing with other parties to a treaty. The international community is well-aware of the constitutional role of the Senate in the treaty-making process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings. It is to our national advantage to ensure that such authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretative dispute among nations.

B. By asserting that executive branch assurances to the Senate may be disregarded, the proposed reinterpretation has raised a direct constitutional confrontation with the Congress.

By asserting that the Executive Branch may now disregard the views of those who spoke for the Administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that Administration witnesses need not accurately reflect the executive's understanding of a treaty; instead, they are free to keep that understanding a secret and may mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate. This line of argument has profound implications for the legislative process in general and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important role, however, in our constitutional system. Such statements are an integral part of the making of a treaty, often shaping its content, and well-known to all parties to the proposal.

Under Article II, section 2, clause 2 of the Constitution, the presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present. Article VI, paragraph 2 provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field, has noted that "although treaty-making has often been characterized as an executive function (in that special sense in which the conduct of foreign relations is executive), constitutional writers have considered the making of treaties to be different from others exercises of presidential power, principally because of the Senate's role in the process, perhaps too because treaties have particular legal and political qualities and consequences." [64]

Hamilton, in The Federalist (No. 75), clearly illustrated the intent of the Framers that treaty-making be a shared power between Congress and the President, based on mutual trust: [65]

"The power in question seems * * * to form a distinct department, and to belong, properly, neither to the legislative nor the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them."

Madison took the position that "there are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character." [66]

The Senate has played a vital role in numerous treaty negotiations, through means such as the process of confirming negotiators, statutory requirements for congressional consultation during the negotiations process, and informal discussions.[67] Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent (either expressly or through inaction), or approve it with conditions.[68]

Because the Senate is an active participant in the making of the treaty, the hearings and debates are a vital source of information as to what the treaty means. The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions (e.g., if there is dispute as to a provision) or forego conditions (e.g., if there is an authoritative statement as to the meaning of a provision.)

The position of the State Department sends a clear message to the Senate: you cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the issues at hand regarding the ABM treaty. Our treaty relationships involve not only arms control matters, but also trade and business matters affecting the economic well-being of our nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

Because treaties are the supreme law of the land, the position of the State Department, if accepted by the Executive Branch, would compel the Senate to incorporate into its resolution of consent an "amendment" of "understanding" for every explanation given by an executive branch witness lest it be disavowed as "unilateral" afer ratification. Treaties so laden would sink under their own weight. It would be extemely difficult to achieve bilateral agreements, and virtually impossible for the United States to participate in multilateral treaties. In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to ensure that no secret understandings would emerge contrary to assurances given to the Senate.

In short, in an effort to save the Reinterpretation by asserting that Executive Branch statements to the Senate are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the Executive Branch and Congress. It would be a mistake for the Executive Banch to compound the problem further by asserting that the Senate has no role to play with respect to the meaning of treaties. Although the President traditionally has determined the position of the United States as to the meaning of a treaty for international purposes, his authority is not unilateral. It is subject, for example, to any understandings imposed by the Senate in its consent to ratification.[69] Moreover, as noted by Henkin, "Congress, too, has occasion to interpret a treaty when it considers implementing legislation or other legislation on the same subject [and has] * * * claimed the right to interpret a treaty independently, even while admitting that the Executive's interpretation is entitled to 'great weight.' It could happen, then, that Congress and the courts would in effect apply treaty provisions differently from those that bind the United States internationally—another cost of the separation of powers."[70]

As a general proposition, the views of the Executive on the interpretation of a treaty normally receive great deference from the Congress. Application of that principle in terms of the meaning presented to the Senate by the Executive Branch at the time of ratification leads to an interpretation that mobile/space-based exotics may not be developed or tested. Under the Reinterpretation, such testing and development is permitted. In this situation, many in the Senate may be inclined to apply the classic line of cross-examination to the Executive Branch: "Should we believe what you were telling us then or should we believe what you are telling us now?"

The Senate has the right to presume that Executive Branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treaty-making process. The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a Treaty has the unfortunate effect of directly challenging the Senate's constitutional role. The effect may well produce a Congressional backlash through exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the Treaty as presented to the Senate.

C. Conclusion

The Senate was clearly informed by the Executive Branch that the Treaty prohibits testing and development of mobile/space-based ABMs using exotics. This was an issue which key Senators viewed as a matter of significance, and which was directly addressed by the Executive Branch during the treaty-making process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of the Treaty:

a. If the negotiating record and evidence of subsequent practice by the parties supports the Traditional Interpretation, the issue would be beyond question.

b. If the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would be no basis for abandoning the Traditional Interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the Executive Branch at the time of ratification should be upheld.

c. If the negotiating record and evidence of the subsequent practices of the United States and the Soviet Union establish a conclusive basis for the Reinterpretation, this would mean that the Nixon Administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications—to say the least. In effect, the President would have to choose between the Executive Branch's obligations to the Senate and its contract with the Soviet Union. If he did not choose to honor the commitments the Senate, the Senate would have to develop an appropriate response or risk having its role in the treaty-making process become meaningless.

In two reports which I intend to present to the Senate within a few days, I will address the subsequent practice of the two parties and the Treaty negotiating record with a view towards determining which of the three situations currently confronts the Senate.

FOOTNOTES

[1] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM Treaty].

[2] *Strategic Arms Limitation Agreements: Hearings before the Senate Foreign Relations Committee*, 92d Cong., 2d Session 5 [hereinafter cites as *1972 Foreign Relations Hearings*]

[3] *See* Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv. L. Rev. 1971 (1986). Sofaer also has described his analysis in a number of congressional hearings. *E.G., Strategic Defense Initiative, Hearings Before the Senate Committee on Armed Services*, 99th Cong., 1st Sess. 136–91 (1985) [hereinafter cited as *1985 Senate Hearings*]; *Treaty Interpretation Dispute: Hearing Before the Subcommittee on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 4–51 [hereinafter cited as *1985 House Hearing*].

[4] *1985 Senate Hearings, supra* note 3, at 142.

[5] *Id.* at 167.

[6] *Id.* at 141.

[7] *1985 House Hearing, supra* note 3, at 10.

[8] *1985 Senate Hearings, supra* note 3, at 264.

[9] *Id.* at 398.

[10] *Id.* at 399.

[11] *See* note 3 *supra*.

[12] The Vienna Convention on the Law of Treaties, Signed by the United States in Vienna, April 24, 1970, submitted to the Senate on November 22, 1971 by President Nixon but not ratified, Executive L, 92d Congress, 1st Session, 8 I.L.M. 679.

[13] Lord NcNair, *Law of Treaties* 380–81 (1961). *See also*, McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* 82–111 (1967).

[14] McNair, *supra*, at 424.

[15] *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 6—Volume 2, April 12, 1985.

[16] *Id.*; McDougal, Lasswell, and Miller, *supra* note 13, at 132–44.

[17] 279 U.S. 47 (1929); *see Air France v. Saks*, 470 U.S. 392, 396 (1985).

[18] *Restatement, supra* note 15, at 325–4.

[19] *Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Committee on Armed Services*, 92d Cong., 2d Sess. 40 (1972) [hereinafter cited as *1972 Armed Services Hearings*].

[20] *Id.* at 40–41.

[21] "Analysis of U.S. Post-Negotiation Public Statements Interpreting the ABM Treaty's Application to Future Systems," The Legal Adviser, U.S. Department of State, October 30, 1985, reprinted in *1985 Senate Hearings, supra* note 3, at 167.

[22] 99 *Harv. L. Rev.* at 1982 n. 28.

[23] 118 *Cong. Rec.* 19,411 (1972). Senator Jackson said, "I was greatly disturbed, for example, to learn only yesterday that Secretary Laird has ordererd the cancellation of a theoretical study conducted by one of our research organizations of the application of laset technology to ballistic missile defense. Nothing in the agreements as they have been published would call for this action."

[24] *1972 Armed Services Hearings, supra* note 19, at 31.

[25] *Id.* at 274.

[26] *Id.* at 275.

[27] *Id.*, transcript at 312.

[28] *1985 Senate Hearings, supra* note 3, at 169–170.

[29] *Id.* at 171.

[30] *Id.* at 170.

[31] *Id.* at 171.

[32] *1972 Armed Services Hearings, supra* note 19, at 439.

[33] *Id.* at 440.

[34] *Id.* at 438.

[35] *Id.* at 443.

[36] *1972 Foreign Relations Hearings, supra* note 2, at 258.

[37] *Id.* at 268.

[38] *Id.* at 269.

[39] *118 Cong. Rec.* 26,703 (1972).

[40] *1985 Senate Hearings, supra* note 3, at 171.

[41] 118 *Cong. Rec.* 26,700 (1972).

[42] *1985 Senate Hearings, supra* note 3, at 171.

[43] *See 1972 Armed Services Hearings, supra* note 19, at 99. It is noteworthy that in the same statement Smith said that Article II, which defines ABM systems covered by the Treaty, "has a very important bearing on the whole question of what we call future ABM systems." This directly contradicts the Reinterpretation, which is based on the premise that Article II does not cover future systems.

[44] *1986 Senate Hearings, supra* note 3, at 168.

[45] *Reprinted in 1972 Armed Services Hearings, supra* note 19, at 81. Under the same subheading ("Future ABM Systems"), Rogers' letter also included a discussion of the definitions in Article II and the prohibitions on deployment in Article III under this same subheading ("Future ABM Systems"), thereby indicating that such exotics were covered by these provisions. This contradicts the Reinterpretation's contention that exotics were covered only by Agreed Statement D.

[46] *1972 Foreign Relations Hearings, supra* note 2, at 6, 20. In his prepared statement, Rogers said, "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e., systems depending on such devices as lasers, may not be deployed, even in permitted areas." Later, in response to a question by Senator Aiken about laser ABMs, he said, "Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, ABM system based on the laser principle."

[47] *Id.* at 20. In response to another question by Senator Aiken on Laser ABMs, Smith said:

> * * * we have covered this concern of yours in this treaty by prohibiting the deployment of future type technology. Unless the Treaty is amended, both sides can only deploy launchers and interceptors and radars. There are no inhibitions on modernizing this type of technology except that it cannot be deployed in mobile land-based or space-based or sea-based or air-based configurations. But the laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended.

[48] *1972 Armed Services Hearings, supra* note 19, at 287. Smith said: "The development and testing, as well as deployment of sea, air, space-based, and land-mobile ABM devices is prohibited. Of perhaps even greater importance, the parties have agreed that no future types of ABM systems based on different physical principles from present technology can be deployed unless the treaty is amended."

[49] *Id.* at 171.
[50] *Id.* at 222.
[51] *Id.* at 295.
[52] *Id.* at 306.
[53] 118 *Cong. Rec.* at 26,707 (1972). Senator Fong said, "[The Treaty] (a)llows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems."
[54] *Id.* at 26,693.
[55] *1985 Senate Hearings, supra* note 3, at 167.
[56] Foreign Broadcast Information Service, Oct. 19, 1985, at AA3.
[57] 99 Harv. L. Rev. at 1985 n.37.
[58] McNair, *supra* note 13, at 424.
[59] *Id.* at 427.
[60] *Id.* at 429.
[61] *Corbin on Contracts* (C. Kaufman, ed., Supp. 1984), at 462.
[62] *McNair, supra* note 13, at 431. *Cf. Anglo-Iranian Oil Case* (United Kingdom v. Iran) ICJ Reports (1952) at 16–18 in which the International Court of Justice noted the failure of the British Government to object to Iranian domestic legislation as evidence of Iran's obligations under a treaty with respect to the British Government.
[63] *1972 Armed Services Hearings, supra* note 19, at 437. This exchange—which immediately preceded the discussion in which the word laser was used thirteen times—went as follows:

Senator GOLDWATER. I recognize what I have said about the inability of the man in uniform and inability of the man in civilian clothes to answer pertinent questions that I think we should have the answers to, and I keep thinking of Senator Jackson's remarks here about the member of the Soviet embassy. Is he here today?

Senator JACKSON. Yes.

Senator GOLDWATER. He is an expert in this field—Senator Jackson said this gentleman knows all the answers to the questions I am asking—I can't understand why a U.S. Senator can't have the same knowledge.

[64] L. Henkin, *Foreign Affairs and the Constitution*, 130 (1972).
[65] *The Federalist Papers*, No. 75.
[66] Quoted in *Henkin, supra* note 64 at 130, n.*.
[67] *See* Henkin, *supra* note 64, at 131–36; *Treaties and Other International Agreements: The Role of the Senate*, S. Rpt. No. 205, 98th Cong., 2d Sess. 30–36 (1984) (Prepared for the Senate Foreign Relations Committee by the Congressional Research Service).
[68] S. Rpt. 205, *supra*, at 109–18.
[69] *Id.* at 119–29.
[70] *Henkin, supra* note 64, at 167, n*.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS

Signed at Moscow May 26, 1972.

Ratification advised by U.S. Senate August 3, 1972.

Ratified by U.S. President September 30, 1972.

Proclaimed by U.S. President October 3, 1972.

Instruments of ratification exchanged October 3, 1972.

Entered into force October 3, 1972.

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties.

Proceeding from the premise that nuclear war would have devastating consequences for all mankind.

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons.

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms.

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament.

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States.

Have agreed as follows:

ARTICLE I

1. Each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

ARTICLE II

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles, and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode

2. The ABM system components listed in paragraph 1 of this Article include those which are:

(a) operational;

(b) under construction;

(c) undergoing testing;

(d) undergoing overhaul, repair or conversion; or

(e) mothballed.

ARTICLE III

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radars complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

ARTICLE IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development of testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

ARTICLE V

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capability, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

ARTICLE VI

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode, and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward

ARTICLE VII

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

ARTICLE VIII

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

ARTICLE IX

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

ARTICLE X

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

ARTICLE XI

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

ARTICLE XII

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

ARTICLE XIII

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and re-

lated situations which may be considered ambiguous;

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed

(c) consider questions involving unintended interference with national technical means of verification.

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty.

(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty.

(f) consider, as appropriate, possible proposals for further increasing the viability of the Treaty, including proposals for amendments in accordance with the provisions of this Treaty.

(g) consider, as appropriate, proposals for further measures amend at limiting strategic arms.

2. The Parties through consultation shall establish and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

ARTICLE XIV

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five-year intervals thereafter, the Parties shall together conduct a review of this Treaty.

ARTICLE XV

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

ARTICLE XVI

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

DONE at Moscow on May 26, 1972, in two copies, each in the English and Russian languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA,
RICHARD NIXON,
President of the United States of America.

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS,
L. I. BREZHNEV,
General Secretary of the Central Committee of the CPSU.

AGREED STATEMENTS, COMMON UNDERSTANDINGS, AND UNILATERAL STATEMENTS REGARDING THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILES

1. AGREED STATEMENTS

The document set forth below was agreed upon and initialed by the Heads of the Delegations on May 26, 1972 (letter designations added):

Agreed statements regarding the treaty between the United States of America and the Union of Soviet Socialist Republics on the limitation of Anti-Ballistic Missile Systems:

[A]

The Parties understand that in addition to the ABM radars which may be deployed in accordance with subparagraph (a) of Article III of the Treaty, those non-phased-array ABM radars operational on the date of signature of the Treaty within the ABM system deployment area for defense of the national capital may be retained.

[B]

The Parties understand that the potential (the product of mean emitted power in watts and antenna area in square meters) of the smaller of the two large phased-array ABM radars referred to in subparagraph (b) of Article III of the Treaty is considered for purposes of the Treaty to be three million.

[C]

The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers.

[D]

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

[E]

The Parties understand that Article V of the Treaty includes obligations not to develop, test or deploy ABM interceptor missiles for the delivery by each ABM interceptor missile of more than one independently guided warhead.

[F]

The Parties agree not to deploy phased-array radars having a potential (the product of mean emitted power in watts and antenna area in square meters) exceeding three million, except as provided for in Articles III, IV and VI of the Treaty, or except for the purposes of tracking objects in outer space or for use as national technical means of verification.

[G]

The Parties understand that Article IX of the Treaty includes the obligation of the U.S. and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty.

2. COMMON UNDERSTANDINGS

Common understanding of the Parties on the following matters was reached during the negotiations.

A. Location of ICBM Defenses

The U.S. Delegation made the following statement on May 26, 1972:

Article III of the ABM Treaty provides for each side one ABM system deployment area centered on its national capital and one ABM system deployment area containing ICBM silo launchers. The two sides have registered agreement on the following statement: "The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers." In this connection, the U.S. side notes that its ABM system deployment area for defense of ICBM silo launchers, located west of the Mississippi River, will be centered in the Grand Forks ICBM silo launcher deployment area. (See Agreed Statement [C].)

B. ABM Test Ranges

The U.S. Delegation made the following statement on April 26, 1972:

Article IV of the ABM Treaty provides that "the limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges." We believe it would be useful to assure that there is no misunderstanding as to current ABM test ranges. It is our understanding that ABM test ranges encompass the area within which ABM components are located for test purposes. The current U.S. ABM test ranges are at White Sands, New Mexico, and at Kwajalein Atoll, and the current Soviet ABM test range is near Sary Shagan in Kazakhstan. We consider that non-phased array radar of types used for range safety or instrumentation purposes may be located outside ABM test ranges. We interpret the reference in Article IV to "additionally agreed to ranges to mean that ABM components will not be located at any other test ranges without prior agreement between our Governments that there will be such additional ABM test ranges.

On May 5, 1972, the Soviet Delegation stated that there was a common understanding on what ABM test ranges were, that the use of the types of non-ABM radars for range safety or instrumentation was not limited under the Treaty, that the reference in Article IV to "additionally agreed" test ranges was sufficiently clear, and that national means permitted identifying current test ranges.

C. Mobile ABM Systems

On January 29, 1972, the U.S. Delegation made the following statement:

Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based AMB systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1917.

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.

D. Standing Consultative Commission

Ambassador Smith made the following statement on May 22, 1972:

The United States proposes that the sides agree that, with regard to initial implementation of the ABM Treaty's Article XIII on the Standing Consultative Commission (SCC) and of the consultation Articles to the interim Agreement on offensive arms and the Accidents Agreement,[1] agreement establishing the SCC will be worked out early in the follow-on SALT negotiations; until that is completed. The following arrangements will prevail when; SALT is in session, any consultation desired by either side under these Article can be carried out by the two SALT Delegations; when SALT is not in session, *ad hoc* arrangements for any desired consultations under these Articles may be made through diplomatic channels.

Minister Semenov replied that, on an *ad referendum* basis, he could agree that the U.S. statement corresponded to the Soviet understanding.

E. Standstill

On May 6, 1972, Minister Semenov made the following statement:

In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972.

ARMS CONTROL AND DISARMAMENT AGREEMENTS

The U.S. agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that pending ratification and acceptance, neither side would take any action prohibited by the agreements after they had entered in force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.

3. UNILATERAL STATEMENTS

The following noteworthy unilateral statements were made during the negotiations by the United States Delegations:

A. Withdrawal from the ABM Treaty

On May 9, 1972, Ambassador Smith made the following statement:

The U.S. Delegation has streessed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on an Interim Agreement on certain measures with respect to the limitation of strategic offensive arms. The * * * Delegation believes that an objective of the follow-on negotiations should * * * constrain and reduce on a long-term basis threats to the survivability of * * * respective strategic retaliatory forces. The USSR Delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitation on strategic offensive arms. Both sides recognize that the initial agreements would be steps toward the achievement of more complete limitations on strategic arms. If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years. U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty. The U.S. does not wish to see such a situation occur, nor do we believe that the USSR does. It is because we wish to prevent such a situation that we emphasize the importance the U.S. Government attaches to achievement of more complete limitations on strategic offensive arms. The U.S. Executive will inform the Congress, in connection with Congressional consideration of the ABM Treaty and the interim Agreement of this statement of the U.S. position.

B. Tested in ABM Mode

On April 7, 1972, the U.S. Delegation made the following statement:

Article of the Joint Text Draft uses the term "tested in an ABM mode" indefining ABM components and Article VI includes certain obligations concerning such testing. We believe that the sides should have a common understanding of this phrase. First, we would note that the testing provisions of the ABM Treaty are intended to apply to testing which occurs after the date of signature of the Treaty, and not to any testing which may have occurred in the past. Next, we would amplify the remarks we have made on this subject during the previous Helsinki phase by setting forth the objectives which govern the U.S. view on the subject, namely, while prohibiting testing of non-ABM components for ABM purposes: not to prevent testing of ABM components, and not to prevent testing of non-ABM components * * * non-ABM purposes. To clarify our interpretation of "tested in an ABM mode" we note that we would consider a launcher, missile or radar to be "tested in an ABM mode" if, for example, any of the following events occur (1) a launcher is used to launch an ABM interceptor missile, (2) an interceptor missile is flight tested against a target vehicle which has a flight trajectory with characteristics of a strategic ballistic missile flight trajectory, or is flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range, or is flight tested to an altitude inconsistent with interception of targets against which air defenses are deployed, (3) a radar makes measurements on a cooperative target vehicle of the kind referred to in item (2) above during the reentry portion of its trajectory or makes measurements in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range. Radars used for purposes such as range safety or instrumentation would be exempt from application of these criteria.

C. No-Transfer Article of ABM Treaty

On April 18, 1972, the U.S. Delegation made the following statement:

In regard to this Article [IX], I have a brief and I believe self-explanatory statement to make. The U.S. side wishes to make clear that the provisions of this Article do not set a precedent for whatever provision may be considered for a Treaty on Limiting Strategic Offensive Arms. The question of transfer of strategic offensive arms is a far more complex issue, which may require a different solution.

D. No Increase in Defense of Early Warming Radars

On July 28, 1970, the U.S. Delegation made the following statement:

Since Hen House radars [Soviet ballistic missile early warning radars] can detect and track ballistic missile warheads at great distances, they have a significant ABM potential. Accordingly, the U.S. would regard any increase in the defenses of such radars by surface-to-air missiles as inconsistent with an agreement.

Mr. NUNN. Mr. President, I have a letter from Judge Sofaer on the subject I was addressing. In that letter, without trying to quote it directly because I do not have it with me, he mentioned he is going to go back through this Senate record very carefully and thoroughly. He also indicates that his prime consideration when he was doing his original research was on the negotiating record of the treaties rather than the Senate record.

So I ask unanimous consent that letter, by way of explanation, from Judge Sofaer be inserted in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF STATE,
THE LEGAL ADVISER,
Washington, DC, March 9, 1987.

Hon. SAM NUNN,
U.S. Senate, Washington, DC.

DEAR SENATOR NUNN: As you know, the President has directed that further work be done on the remaining issues associated with the interpretation of the ABM Treaty. This additional work will focus on the ratification process, and on subsequent practice of the parties; April 30 is the target for completion.

The points made on the ratification record of the Treaty that were contained in our October 1985 analysis of the negotiating record did not provide a complete portrayal of the ratification proceedings with respect to this issue. I concentrated during that period on the Treaty language and negotiating history, and I did not review this material personally. The August 1986 study provided to the Senate was not as comprehensive as the current project directed by the President. (It was never meant to be; the August 1986 study covered primarily the Treaty itself and its negotiating record.) The study is more complete, but still fails to cover the subject in full depth. This is why, among other things, the President directed that a thorough study of the ratification record—and of subsequent practice—be undertaken. I will personally review this material and satisfy myself that the analysis we present is complete.

I would note in this connection that my August 1986 classified memorandum to Secretary Shultz did not include various statements in the ratification record which I acknowledged supported the restrictive interpretation, and that these statements may have a bearing on the President's obligations to the Senate. The current study will fully reflect these and other parts of the ratification record. I should also note, however, that the U.S. internal ratification process cannot by itself create international obligations under the Treaty; the Soviet Union does not hold itself to review and be responsible for responding to statements made during U.S. internal proceedings, any more than we held ourselves responsible for responding to Soviet internal proceedings.

I would welcome the opportunity to discuss the negotiating record with you, or any other issue. Our position on the negotiating record is not based on artificial distinctions, but rests on an objective appraisal of Soviet behavior during the negotiations. Nor do we agree that our reading of the record under-

[1] See Article 7 of Agreement to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, signed Sept. 30, 1971.

cuts the basic purposes of the Treaty. Even if the parties were allowed to "create" only fixed, land-based devices by Agreed Statement D, such devices could potentially provide a territorial defense, if deployed. The parties relied on the Treaty's deployment provisions to block any deployment action inconsistent with the Treaty, unless the parties agreed, after consultation, to permit such deployments.

In connection with your analysis of the negotiating record, we have nothing new to add, though we are continuing to search for relevant materials. We believe, however, that in evaluating that record you should keep in mind the standard which the Soviets would apply in deciding whether they are bound to the "narrow" version of the Treaty. The Soviets have applied a strict standard in the past in connection with U.S. claims that they were bound to a given interpretation of an arms control agreement. We are collecting materials relevant to this question. Meanwhile, however, you no doubt recall the Soviet position on our unilateral statement on what constituted a "heavy" missile in the SALT I Interim Agreement. They also led us to believe they had no test range at Kamchatka, making clear the need for us to pin down any obligation. I will shortly provide you with a more detailed description of these instances of Soviet negotiating conduct for your appraisal.

If you agree, Mr. Nitze would like to join me in our discussion so that he could contribute his judgment on the policy issues involved.

Sincerely your,

ABRAHAM D. SOFAER.

Mr. NUNN. Mr. President, I thank the Senator from West Virginia for arranging this rather lengthy time. I think that this matter requires lengthy explanation. I know it is unusual, but I appreciate the time the Senator has accorded me this afternoon.

I also want to say that the Senator from West Virginia has done his own analysis in this area. I have not discussed with him in great detail his conclusions. I am not sure if we are on par on everything, but I will be looking forward with great anticipation hearing the Senator from West Virginia's views when he does address this subject.

(During Mr. NUNN's remarks, Mr. HARKIN assumed the chair.)

Mr. BYRD. Mr. President, I thank the distinguished Senator from Georgia. He has approached this important matter, as he approaches all such subjects, very studiously and, in a very scholarly presentation, has stated clearly today his analysis of the matter. As I understand it, he will be speaking again on the Senate floor on the subject. May I ask, is it his intention to speak again tomorrow and/or on Friday if the Senate is in session both days?

Mr. NUNN. Mr. President, I will have the portion on the subsequent behavior of the two parties, that is the United States and the Soviet Union subsequent to the treaty being ratified, I would have that prepared and ready by tomorrow. If the Senate is in session, it would be my intention to present it then. I hope to have the analysis of the negotiating record ready by Friday. It would be my intention to present those at that time, hopefully in better voice.

Mr. BYRD. Mr. President, the Senator has spoken under difficult conditions today, with his case of laryngitis.

The Senate will be in tomorrow, if the Senator wishes to speak on the subject tomorrow.

Mr. NUNN. I would like to get some time tomorrow that is appropriate and convenient to the leadership.

Mr. BYRD. Very well. That will be arranged.

I compliment the able Senator on the presentation of his analysis on the subject. He has been going into the historic record, the negotiating record, the record of the Senate debates, the understanding of the Senate, the understanding of committees in the Senate that conducts hearings. His analysis should be read and carefully considered by the administration, by his colleagues here in the Senate, by the press, by the people. He renders a great service. When the Senator from Georgia speaks on a matter that involves our national defense, people listen. I listen. And I compliment him, and, more than that, I thank him for the work he has been doing. It takes a lot of his time.

He has been working laboriously at this task for many, many weeks. And I know that Senators recognize that Senator NUNN has done more work in this area and has given effort to it than has anybody else in the body. That is why we all listen when he speaks.

Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. PELL. Mr. President, I regret that I was not here when the Senator from Georgia was giving his speech. I was presiding at a meeting on foreign relations. But I look forward to reading it. I rise merely to pay my respect to him, and my regard for him is of the highest order. I know the contributions he made on the floor this morning will be read by many of us. It will have an effect like a pebble falling into a pool of water where the ripples go out.

I wish him well. I hope his voice recovers for his appearance before our committee this afternoon for about 20 minutes.

Mr. NUNN. I will be there.

I thank the Senator from Rhode Island. I thank the Senator from West Virginia.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

TRADE CROSSROADS

Mr. GRASSLEY. Mr. President, the 100th Congress is now beginning to formulate the direction of trade legislation in the shadow of mounting trade and budgetary deficits. Coupled with this action, the administration proposes legislation to improve U.S. competitiveness.

Some will interpret the present mood that is going on in the Congress—and maybe the country as a whole—as protectionism on the rise in the United States. Yet many individuals—including myself—see it more as a move to open foreign markets now closed, and beef up trade laws not currently being enforced. Mired in all of this, however, loomed the real potential for a trade war between the United States and the European Common Market. This trade war was only recently sidestepped when a 4-year agreement was reached at the last moment.

As might be expected, this agreement drew mixed reviews. I happen to think it was not a very good agreement. The administration trumpeted it as a victory for the President's tough new negotiating posture. The corn growers said the agreement is more evidence that the Reagan administration has no backbone when it comes to trade negotiations. The Farm Bureau said the provisions were disappointing to feed grain producers, but may be the best deal possible at the particular time. As for others, they feel the battle merely shifted to a new front—and that could be the European fight against importation of our soybeans.

Most trade groups are hoping for progress in the new round of international trade talks scheduled in Geneva. Our goal will be to try and obtain concessions from Europe to reduce its huge export subsidies. Yet, our posture in this recent agreement may have already set the tone for some difficult discussions in the weeks ahead.

Most alarming to me is that, in less than 10 years, Europe has gone from one of the United States' biggest grain buyers to its most aggressive export competitor. How did they do all this? Did they have some kind of secret weapon? You bet! In one word it is called subsidies.

The time has come for us to get moving on this issue, within the framework of the GATT, as well as in the House and Senate. We must move now if we are to achieve any meaningful results in the attempt to halt our eroding trade posture.

The decline in agricultural exports have significantly cut into what was once a healthy agricultural trade surplus. Exports exceeded imports annually by over $10 billion between 1974 and 1975—and in some years, by more than twice that amount. Now the United States has been running an annual trade deficit in processes food products since 1983.

This decline has had a number of serious repercussions throughout the U.S. economy. Farmers look to the export market to take the production from more than one-third of their cropland. Falling exports have result-